87-1798

No.

IN THE

Supreme Court Of The United States

October Term, 1987

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
Petitioner,

v.

MARSHALL DURBIN FOOD CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an assessment of one million dollars in punitive damages violates the Constitution, in particular, the 5th, 8th, and 14th Amendments.

2. Whether Federal Rule of Civil Procedure 9(b) must be followed in complaints alleging fraud, notwithstanding the defendant's right to conduct discovery.

3. Whether ERISA, 29 U.S.C. § 1001, *et seq.*, prohibits the assessment of punitive damages in this case involving an employee insurance plan.

PARTIES TO THE PROCEEDING

The only two parties to the proceeding are shown in the caption in the case. Subsidiaries of Marshall Durbin Food Corporation include Marshall Durbin Management Company, Inc.; Marshall Durbin Farms, Inc.; Marshall Durbin Company of Jasper, Inc.; Marshall Durbin, Inc.; Marshall Durbin, Tupelo, Inc.; Marshall Durbin, Memphis, Inc.; Marshall Durbin Poultry Company, Inc.; and Agri-Business Supply Company. Subsidiaries and affiliates of The Equitable Life Assurance Society of the United States include The Equitable of Colorado, Inc.; The Equitable of Japan; Equitable Variable Life Insurance Company; Integrity Life Insurance Company; National Integrity Life Insurance Company; Tandem Financial Group, Inc.; Royal Tandem Life Insurance Company; EQUICOR-Equitable HCA Corporation; EQJ Partnership; and Equitable Holding Corporation.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Jurisdictional Statement 2

Constitutional Provisions, Statutes and Rule Involved 2

Statement of the Case 2

Reasons for Granting the Writ 4

I. The Assessment of Punitive Damages Is Unconstitutional 4

A. The assessment of punitive damages here violates the Eighth Amendment 4

B. The assessment of punitive damages violate due process afforded by the Fifth and Fourteenth Amendments 6

C. The assessment of punitive damages violates equal protection afforded by the Fourteenth Amendment 10

II. Rule 9(b) Requires Fraud to be Pleaded with Specificity 12

III. The Assessment of Punitive Damages Here is Prohibited by ERISA, 29 U.S.C. § 1001 *et seq.* 15

Conclusion 16

Appendix

U. S. Constitutional Provisions A-1

Federal Statute A-2

Alabama Constitution Provisions A-2

Rule A-3

Lower Court Opinion and Orders A-4

TABLE OF AUTHORITIES

Constitutional Provisions and Statutes: *Page(s)*

U.S. Const. Art. I, § 10 12

U.S. Const. Amend. V 6

U.S. Const. Amend. VIII 5, 6

U.S. Const. Amend. XIV 6, 10

Ala. Const. Art. I, § 1 10

Ala. Const. Art. I, § 6 ..... 6, 10

Ala. Const. Art. I, § 15 4

Ala. Const. Art. I, § 22 ..... 10, 12

29 U.S.C. § 1144 15

ALA. CODE § 13A-5-12 (Repl. Vol. 1982) 5

ALA. CODE § 13A-9-40, *et seq.* (Repl. Vol. 1982) 5

Rules:

Red. R. Civ. P. 9(b) 11, 12, 14, 15

Fed. R. Civ. P. 12(h) 15

Cases:

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) 5

Aetna Life Insurance Co. v. Lavoie, 505 So. 2d 1050 (Ala. 1987) 4, 6, 9

Bankers Life & Casualty Co. v. Crenshaw, 483 So. 2d 254 (Miss. 1985), U.S. appeal pending, ... U.S. ....., 107 S. Ct. 1367 (1987) 6

Fay v. Parker, 53 N.H. 342 (1873) 4, 10

Friedlander v. Nims, 755 F.2d 810 (11th Cir. 1985) 15

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 8

Giaccio v. Pennsylvania, 382 U.S. 399 (1966) 11

Gross v. Diversified Mortgage Investors, 431 F. Supp. 1080 (S.D.N.Y. 1977), *aff'd*, 636 F.2d 1201 (2nd Cir. 1980) 14

TABLE OF AUTHORITIES — (Continued)

Cases: *Page(s)*

Hayduk v. Lanna, 775 F.2d 441 (1st Cir. 1985) 14

Jordan v. De George, 341 U.S. 223 (1951) 11

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) 5

Killibrew v. Abbott Laboratories, 359 So. 2d 1275 (La. 1978) 10

Lassiter v. Dept. of Social Services, 452 U.S. 18 (1981) 6

Maki v. Aluminum Building Products, 73 Wash. 2d 23, 436 P.2d 186 (1968) 10

Marshall Durbin Food Corp. v. Equitable Life Assurance Society of the United States, 834 F.2d 949 (11th Cir. 1987) 12, 15

Matthews v. Eldridge, 424 U.S. 319 (1976) 8, 10

Mid-America Hotel Corp. v. Bernstein, 664 F. Supp. 384 (N.D. Ill. 1987) 16

Miller v. Kingsley, 194 Neb. 123, 230 N.W.2d 472 (1975) 10

Morrison Assurance Co. v. North American Reinsurance Corp., 558 F. Supp. 1324 (N.D. Ala. 1984), *aff'd*, 760 F.2d 279 (11th Cir. 1985) 14

Murphy v. Hobbs, 77 Colo. 541, 5 P. 119 (1884) 6, 10

Ohio-Sealy Mattress Manufacturing Co. v. Kaplan, 90 F.R.D. 21 (N.D. Ill. 1980) 14

Pereira v. International Basic Economy Corp., 95 P.R.R. 28 (1967) 10

Pickett v. Matthews, 238 Ala. 542, 192 So. 261 (1939) 10

Pilot Life Insurance Co. v. Dedeaux, 481 U.S. ....., 107 S. Ct. 1549 (1987) 15

Robinson v. Allstate Insurance Co., 399 So. 2d 288 (Ala. 1981) 14

Schiller v. Strangis, 540 F. Supp. 605 (D. Mass. 1982) 10

Segal v. Gordon, 467 F.2d 602 (2nd Cir. 1972) 14

TABLE OF AUTHORITIES – (Continued)

Cases: *Page(s)*

Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983) 15

Smith v. Wade, 461 U.S. 30 (1983) 7, 10, 11

State Farm Fire & Casualty Co. v. Fincher, 454 So. 2d 936 (Ala. 1984) 14

Vratsenes v. N. H. Auto, Inc., 289 A.2d 66 (N.H. 1972) 10

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Ford, *The Constitutionality of Punitive Damages*, D. HIRSCH & J. POURIS, THE CASE AGAINST PUNITIVE DAMAGES (Defense Research Institute 1969) 5, 11

Geller & Levy, *The Constitutionality of Punitive Damages*, 73 ABA J. 88 (Dec. 1, 1987) 6

Ghiradi, *The Case Against Punitive Damages*, 8 Forum 411 (1972) 9, 11

J. GHIRADI & J. KIRCHER, 1 PUNITIVE DAMAGES LAW & PRACTICE § 3.06 (1984) 12

Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986) 5, 7

Mooney, *A Proposal to Abolish Exemplary, Punitive and Vindictive Damages*, 10 Neb. St. Bar J. 9 (1961) 12

Schmidt, *The Constitutionality of Punitive Damages: A Challenge for the Judiciary*, For the Defense, Feb. 1985 11

Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983) 8, 9

5 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1297 (Supp. 1986) 14

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OPINIONS BELOW

The only written opinion in this case is *Marshall Durbin Food Corp. v. The Equitable Life Assurance Society of the United States*, 834 F.2d 459 (11th Cir. 1987), and is in the Appendix hereto.

JURISDICTIONAL STATEMENT

The district court judgment was entered on March 20, 1987. The judgment of the court of appeals was entered on December 23, 1987. A timely petition for rehearing was thereafter filed and was denied on January 29, 1988. The Equitable Life Assurance Society of the United States petitions for writ of certiorari pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Fifth Amendment.

Eighth Amendment.

Fourteenth Amendment.

Article 1, § 10, Contracts Clause.

ERISA, 29 U.S.C. § 1001 *et seq.*, in particular 29 U.S.C. § 1144 (a).

Federal Rule of Civil Procedure 9 (b).

The text of each is set out in the Appendix hereto.

STATEMENT OF THE CASE

On October 25, 1984, Respondent Marshall Durbin Food Corporation ("Durbin") filed its four count complaint against the Petitioner Equitable Life Assurance Society of the United States ("Equitable") in the United States District Court for the Northern District of Alabama on the basis of the diversity jurisdiction under 28 U.S.C. § 1332.

The facts of the case are set out by the court of appeals decision, but Equitable summarizes them as follows:

Durbin alleged that Equitable owed it a policy dividend when it cancelled its group coverage with Equitable on June 30, 1982. Durbin said that failure to pay the dividend was fraud. Equitable said that, as a mutual company, it could pay dividends only when its Board of Directors declared an unimpaired indivisible surplus and then that the surplus would be distributed only by dividend formula adopted by its Board.

Of the four counts in Durbin's complaint, the first sounded in contract while the others contained conclusionary allegations of fraudulent inducement, misrepresentation of a material fact, bad faith, and willful fraud. Durbin never alleged a tort of concealment or suppression. Court of appeals decision, 834 F.2d at 950-51.

United States District Judge U. W. Clemon overruled Equitable's motion to dismiss, or in the alternative, motion for a more definite statement under Federal Rule of Civil Procedure 9(b) on April 23, 1985. At trial of the case on March 17, 18, and 19, 1987, the trial court overruled two motions for directed verdict by Equitable. The jury's verdict on March 20, 1987, was against Equitable for $46,060.00 in compensatory damages and $1,000,000.00 in punitive damages.

The Eleventh Circuit Court of Appeals denied Equitable's appeal on December 23, 1987, and denied its petition for rehearing on January 29, 1988.

Durbin alleged that a 1976 letter between an employee of Equitable and one of Durbin's employees constituted legal fraud. Durbin's employee who received the letter testified by deposition at trial that he had a clear understanding of the letter; that understanding was the same as presented by Equitable at trial.

Another two Durbin employees testified at trial that they inquired whether a dividend would be paid upon termination, if the termination was not at the end of the policy year. Equitable's employee answered in 1980 that a dividend calculation would be made in accordance with the dividend formula. When the policy was terminated in 1982, Durbin alleges that Equitable used a different formula; Equitable responded that it used its nationwide formula adopted for year 1982. Court of appeals decision, 834 F.2d at 951-52.

In its appeal and petition for rehearing, Equitable raised the issue of the propriety of punitive damages and the excessiveness thereof and questioned the constitutionality of the punitive damages. The court of appeals found that there was sufficient evidence to support a claim for punitive damages; it wrote

no opinion on rehearing regarding the constitutionality of punitive damages. Equitable also appealed because it was "ambushed" at trial since Durbin's complaint did not plead fraud with the particularity required by Federal Rule of Civil Procedure 9(b). The court of appeals held that Equitable's pretrial discovery amounted to notice pleading so as to prevent an ambush. Court of appeals decision, 834 F.2d at 955.

REASONS FOR GRANTING THE WRIT

A. The issue of the constitutionality of punitive damages is an important question of constitutional law which has not, but should be settled by this Court.

B. The federal courts of appeals have rendered conflicting decisions in applying Federal Rule of Civil Procedure 9(b).

C. National uniformity in the enforcement of ERISA is desirable and necessary to the insurance and pension industries.

ARGUMENT AMPLIFYING REASONS FOR GRANTING THE WRIT

I. The assessment of punitive damages is unconstitutional.

"Punitive Damages Destroy Every Constitutional Safeguard Within Their Reach." *Fay v. Parker*, 53 N.H. 342, 397 (1873).

A. The assessment of punitive damages here violates the Eighth Amendment.

The jury levied one million dollars in punitive damages against Equitable. This one million dollars is excessive. Excessive damages are unconstitutional because they are the imposition of an excessive fine prohibited by the Eighth Amendment. Excessive fines also violate Article I, § 15, of the Alabama Constitution. *Aetna Life Insurance Co. v. Lavoie*, 505 So. 2d 1050, 1060-61 (Ala. 1987) (Houston, J., concurring).

The Excessive Fines Clause of the Eighth Amendment can be traced to the provision of the Magna Charta's limitations on amercements. Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 154-56 (1986). Punitive damages in this country have historically been regarded as punishment. *Id.* at 139. An award of punitive damages meets the elements of criminal punishment articulated by Justice Goldberg in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). *See also* Ford, *The Constitutionality of Punitive Damages*, D. HIRSCH & J. POUROS, THE CASE AGAINST PUNITIVE DAMAGES, at 17 (Defense Research Institute, 1969). Even if punitive damages are considered only a quasi-criminal form of punishment, such punitive damages still are "functionally equivalent to the 'fines' addressed by the eighth amendment and should be subject to constitutional scrutiny on that basis." Jeffries, 72 Va. L. Rev. at 151.

The jury's award of $1,000,000.00 in punitive damages is five hundred times greater than the maximum fine provided in the Alabama Criminal Code for fraudulent practices and business frauds. *Compare* Title 13A, Chapter 9 of the Alabama Criminal Code (defining crimes of fraudulent practice and business frauds) *with* Alabama Code § 13A-5-12 (which sets out fines). Business fraud in Alabama is a Class A or Class B misdemeanor. The Alabama Code also provides in § 13A-5-12 for misdemeanor fines not to exceed double the pecuniary gain to the defendant or loss to the victim. Even assuming pecuniary gain by Equitable of the compensatory damages, using this standard, punitive damages would be limited to $92,120.00, less than ten percent of the punitive damages actually awarded.

The issue of whether punitive damages are impermissible under the Excessive Fines Clause of the Eighth Amendment has also been presented before this Court in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), but the Court reached its decision on other grounds. At that time, the Court noted that the constitutionality of punitive damages under the Eighth Amendment and under the Due Process Clause of the Four-

teenth Amendment were "important issues which, in an appropriate setting, must be resolved." *Id.* at 828-29.

This Court has heard argument on this issue appealed to it from Mississippi in *Bankers Life & Casualty Co. v. Crenshaw*, 483 So. 2d 254 (Miss. 1985), U.S. appeal pending, ... U.S. ....., 107 S. Ct. 1367 (1987). If the Court's decision finds no jurisdiction, the issue of punitive damages still must be addressed; this case is an appropriate setting. *See* Geller & Levy, *The Constitutionality of Punitive Damages*, 73 ABA J. 88, 88 (Dec. 1, 1987). The Alabama Supreme Court has been watching this Court's examination of the English common law behind the Eighth Amendment. *Aetna Life Insurance Co. v. Lavoie*, 505 So. 2d 1050, 1059-60 n.1 (Ala. 1987) (Maddox, J., concurring).

B. The assessment of punitive damages violates due process afforded by the Fifth and Fourteenth Amendments.

The lack of sufficient standards for the imposition of punitive damage awards in Alabama violates the Fifth and Fourteenth Amendments' due process clause and Article 1, § 6, of the Alabama Constitution. *See Aetna Life Insurance Co. v. Lavoie*, 505 So. 2d 1050, 1061 (Ala. 1981) (Houston, J., concurring). Alabama law permits the levy of punitive damages without the constitutional safeguards afforded a defendant in criminal prosecution. The Colorado Supreme Court declared this wrong in *Murphy v. Hobbs*, 77 Colo. 541, ..., 5 P. 119, 121 (1884):

> It is doubtful if another instance can be found within the whole range of English or American jurisprudence where the distinctions between civil and criminal procedure are so completely ignored. Plaintiff sues for damages arising from the injury done to *himself*. His complaint or declaration is framed with a view to compensation for a purely private wrong. It need not be under oath, and does not inform defendant that he is to be tried for a public offense. The summons makes no mention of punishment; it simply commands defendant to appear and answer in damages for the private injury inflicted upon plaintiff. When the cause

> is called for trial, no issue upon a public criminal charge is fairly presented by the pleadings. A trial and conviction are had, and punishment by fine is inflicted, without indictment or sworn information. The rules of evidence peculiarly applicable in criminal prosecutions are rejected. The doctrine of reasonable doubt is replaced by the rule controlling in civil actions and a mere preponderance in the weight of testimony warrants conviction. Defendant is compelled to testify against himself, and such forced testimony may produce the verdict under which he is punished. . . .
>
> The law fixes a maximum punishment for criminal offenses, and in this state the presiding judge determines the extent thereof, where a discretion is given; but under the rule we are considering the jury are entirely free from control, except through the court's power — always unwillingly exercised — to set aside the verdict; they may, for an offense which is punishable under criminal statutes by $100 fine at most, award as a punishment many times that sum.

Although "due process" never has been and may never be precisely defined, due process requires constant "fundamental fairness." *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 24-25 (1981). *See also* Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 152 (1986). Fundamental fairness is violated by the vagueness of the criteria for determining punitive damages and the failure of the law to put all people on notice of what activities will suffer punitive damages. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 76 (1982). The attendant discretion given juries and imprecise instructions to juries providing a "vaguely defined, elastic standard" for the award of punitive damages give "free reign to the biases and prejudices of juries." *Smith v. Wade*, 461 U.S. 30, 88 (1983) (Rehnquist, J., dissenting). Juries are unfairly allowed to award punitive damages which may bear no reasonable relationship to the actual harm suffered. *Id.*

Our criminal justice system can be said to err on the side of caution, arguably releasing criminals actually guilty of felonies

because the only proof of that guilt is kept from the jury by the exclusionary rule. Civil punitive damages are assessed in opposite fashion. Rather than forego punishment of some guilty parties to prevent from punishing innocent parties, punitive damages are imposed on more of the latter. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 76 (1982).

This Court has never determined that the procedures used in civil punitive damage awards satisfy due process. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 273 (1983). Indeed, punitive damages do not pass muster under the Court's three factors for determining the level of procedural protection required by due process. *Id.* at 276. In *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), the Court identified the three factors as:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or a substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

As to the first factor, the jury could have assessed any amount of punitive damages against Equitable without limitation. This clearly affects Equitable's "private interest."

The risk of an erroneous deprivation of the defendant's property is heightened by the jury's ability to "assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. . . . [Juries] remain free to use their discretion selectively to punish expressions of unpopular views." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Although Justice Powell's words quoted above dealt with a defamation case, the risk to a defendant in any case involving punitive damages is great. For example, in this case Equitable's corporate representative, Jean Rassel, made an unfortunate comment about chicken farmers in Alabama whose

education perhaps kept them from understanding the 1976 letter. Ms. Rassel tried to explain that she was very protective of such individuals, such as her father, a South Dakota farmer with an eighth grade education. (Transcript at 294). The trial court stated that this comment would be considered by the jury in determining fraud. (Transcript at 394-95). Plaintiff highlighted Ms. Rassel's comment on closing. (Transcript at 608-10). A single inflammatory comment encourages a jury to assess astronomical punitive damages since the jury has no standard by which to govern itself. Passion and prejudice increase the magnitude of this constitutional error. Wheeler, 69 Va. L. Rev. at 285.

The government's interest in punitive damages is that punitive damages supposedly deter intolerable conduct. *Aetna Life Insurance Co. v. Lavoie*, 505 So. 2d 1050, 1061 (Ala. 1987) (Houston, J., concurring). There is no empirical evidence to support this conclusion, despite in-depth examination. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 77 (1982). After his study, Professor Ellis also concluded that the intuitive arguments that punitive damages do *not* deter intolerable conduct are stronger than those arguments supporting deterrence. *Id.* If there is any deterrent value, compensatory damages alone are sufficient to deter intolerable conduct. Ghiradi, *The Case Against Punitive Damages*, 8 Forum 411, 419 (1972). Few lay people have any knowledge of punitive damages, but are quite aware of criminal sanctions for acts which could also lead to punitive damages. *Id.* Thus, the possibility of criminal action is a further deterrence in the event that the possibility of compensatory damages is insufficient. Besides,

> if the defendant's conduct has not been of such character as to evoke society's criminal sanctions, if the community has not previously seen fit to call for punishment of such acts, then there is clearly no reason why a jury may enact and enforce punitive measures on an ad hoc basis.

Id. at 419.

Punishment itself should be left to the criminal justice system, where proper constitutional safeguards are afforded. *Id.* at 424.

The second and third factors articulated in *Matthews* must be weighed against the suggested solution. The unconstitutionality of punitive damages is best solved by elimination of punitive damages. A "significant number" of states prohibit punitive damage awards. *Smith v. Wade,* 461 U.S. 30, 59 (1983), (Rehnquist, J., dissenting). Punitive damages are judicially created and did not exist at common law. *Murphy v. Hobbs,* 77 Colo. 541, ..., 5 P. 119, 122 (1884). The New Hampshire Supreme Court rejected punitive damages in quite colorful language:

> What kind of a civil remedy for the plaintiff is the punishment of the defendant? The idea is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excrescence deforming the symmetry of the body of the law.

Fay v. Parker, 53 N.H. 342, 382 (1873). Jurisdictions that agree include Louisiana (*Killibrew v. Abbott Laboratories,* 359 So. 2d 1275 (La. 1978)); Massachusetts (*Schiller v. Strangis,* 540 F. Supp. 605 (D. Mass. 1982)); Nebraska (*Miller v. Kingsley,* 194 Neb. 123, 230 N.W.2d 472 (1975)); New Hampshire (*Vratsenes v. N. H. Auto, Inc.,* 112 N.H. 71, 289 A.2d 66 (1972)); Puerto Rico (*Pereira v. International Basic Economy Corp.,* 95 P.R.R. 28 (1967)); and Washington (*Maki v. Aluminum Building Products,* 73 Wash. 2d 23, 436 P.2d 186 (1968)).

C. The assessment of punitive damages violates equal protection afforded by the Fourteenth Amendment.

Equal protection is afforded all under the Fourteenth Amendment and Sections 1, 6, and 22 of Article 1 of the Alabama Constitution. *Pickett v. Matthews,* 238 Ala. 542, 192 So. 261 (1939). The jury's award of $1,000,000.00 in punitive damages is, as noted, five hundred times greater than the maximum fine provided in the Alabama Criminal Code for fraudulent practices and business frauds. This denies Equitable equal

protection of the laws. *See* Ghiradi, *The Case Against Punitive Damages,* 8 Forum 411, 419 (1972). There is no rational basis for allowing a jury to assess an unlimited penalty in punitive damages against a civil defendant when the state has seen fit to impose only a moderate criminal penalty for the same type conduct. *See* Ford, *The Constitutionality of Punitive Damages,* D. HIRSCH & J. POURIS, THE CASE AGAINST PUNITIVE DAMAGES, 15, 18 (Defense Research Institute 1969).

In criminal cases, the defendant is constitutionally entitled to learn the specific charges against it prior to trial. The punitive damage award here was unconstitutional because Durbin failed to plead a specific complaint under Federal Rule of Civil Procedure 9(b). Since punitive damages can be awarded for fraud, the complaint must be specific so that the defendant has the opportunity to know what conduct will subject it to penalties. This constitutional standard of specificity is well recognized in criminal statutes but has also been applied by the Court in at least two civil actions: *Giaccio v. Pennsylvania,* 382 U.S. 399 (1966), and *Jordan v. De George,* 341 U.S. 223 (1951). Neither case involved a criminal statute, but both demonstrate application of the vagueness doctrine to the imposition of civil punitive damages. Punitive damages under any circumstances amount to a "Damoclean sword" because punitive damages are assessed in "open-minded, standardless, and unpredictable" fashion. *See Smith v. Wade,* 461 U.S. 30, 89 (1983) (Rehnquist, J., dissenting). Just as criminal punishment must arise from specific conduct prohibited by an unambiguous criminal statute, civil punitive damages, if constitutional, should be awarded only upon a specific complaint. Schmidt, *The Constitutionality of Punitive Damages: A Challenge for the Judiciary,* For the Defense 20, 21 (Feb. 1985).

Historically, punitive damages arose when criminal laws were subject to enforcement by individuals suing for themselves (to obtain part of the penalty as their reward) as well as for the state. When the authority of public officials was expanded to include private enforcement of penal laws and actions such as *qui tam* were abolished, punitive damages, too, should have

been abolished. Mooney, *A Proposal to Abolish Exemplary, Punitive and Vindictive Damages,* 10 Neb. St. Bar J. 9, 9 & n.1 (1961).

Punitive damage assessments also impair contracts by imposing additional, severe obligations. Article 1, Section 10, Clause 1 of the Constitution and Article I, Section 22, of the Alabama Constitution prohibit any law impairing the obligations of contracts. In this case, the parties ceased their contractual arrangement in 1982. In 1986, the jury assessed one million dollars in punitive damages against Equitable. Since the new obligation is an excessive award of punitive damages not assessed by due process and under equal protection of the laws, it is unconstitutional. *See* J. GHIRADI & J. KIRCHER, PUNITIVE DAMAGES: LAW & PRACTICE § 3.06, p. 15 (Cum. Supp. 1987).

II. Rule 9(b) requires fraud to be pleaded with specificity.

There is a strong division among the circuits as to the enforcement of Federal Rule of Civil Procedure 9(b) in fraud cases. The Eleventh Circuit holds that fraud need not be pleaded with particularity if there is "extensive pretrial discovery" on the fraud claim. *Marshall Durbin Food Corp. v. Equitable Life Assurance Society of the United States,* 834 F.2d 949, 955 (11th Cir. 1987). On the other hand, the First and Second Circuits, as cited below, require fraud to be pleaded with particularity in the complaint, in accordance with Rule 9(b):

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity . . .

The trial court erred in failing to require Durbin to plead fraud in Counts Two, Three and Four of its complaint with specificity as required by Federal Rule of Civil Procedure 9(b). Equitable filed a motion to dismiss, or in the alternative, motion for more definite statement on December 21, 1984, stating that Durbin failed to plead fraud with particularity. (Record, Vol. I, p.6). The trial court overruled the motion on

April 23, 1985. Only at trial did Equitable learn what it would be called on to defend itself against.

Durbin did not state the place, the time, or the persons involved in the misrepresentation alleged in Counts Two, Three and Four. Furthermore, Durbin did not specify how the alleged misrepresentation was made, whether it was written or oral, and the contents or substance of the alleged misrepresentation. Durbin failed to identify the formula for calculation of the retrospective premium adjustments which it said was changed. It never alleged what different formula was applied for the retrospective premium adjustment for the final policy period (April 1, 1982, thru June 30, 1982). Durbin did not say what expenditures allegedly were reclassified and what additional expenses allegedly were utilized in this different formula. Durbin failed to specify how the agreement between Durbin and Equitable for retrospective premium payments somehow began to provide for dividend payments or in what form this alleged agreement is preserved. The complaint did not allege and Durbin made no attempt to amend its complaint to allege that the acquisition or investment selection expenses were expenses which caused Durbin to lose a dividend, as Durbin asserted at trial. (Transcript at 197). Further, the complaint did not state Durbin's allegation at trial that the 28% retention was fraudulent.

Durbin also never specified the damage alleged from the alleged fraud, although, immediately prior to trial, it raised its ad damnum to $10,000,000.00. The complaint said Equitable owed Durbin $58,763.00. (Record, Vol. I, pp. 1-4). This figure rose to "at least approximately $60,000.00" in Durbin's position in the pretrial order. (Record, Vol. I, p.44). At trial, this figure became "approximately" $46,000.00 (Transcript at 167), then $46,060.00 from Durbin's attorney. (Transcript at 577). Equitable objected on the record and with its motion in limine to limit calculation of damages. (Record, Vol. I, p.68; Transcript at 574-77). The trial court erred in overruling Equitable's motion and in allowing Durbin to claim the figures above as damages.

Simple technical averments of fraud, such as Durbin's complaint, do not satisfy Rule 9(b). 5 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1297 (Supp. 1986). A fraud complaint is "woefully deficient" if it does not specify conduct and does not attribute that conduct to specific persons. *Ohio-Sealy Mattress Manufacturing Co. v. Kaplan*, 90 F.R.D. 21, 24 (N.D. Ill. 1980). *See also Robinson v. Allstate Insurance Co.*, 399 So. 2d 288, 290 (Ala. 1981). Equitable must be apprised of Durbin's claims to enable it to prepare an effective response and defense. *Hayduk v. Lanna*, 775 F.2d 441, 443 (1st Cir. 1985).

Durbin's complaint violates the spirit of Rule 9(b). Fraud is a very serious charge; Rule 9(b) attempts to minimize fraud claims by requiring a plaintiff to put himself on record as to the specific contents of the alleged fraud. This protects defendants from harm to their reputations by general averments. *Segal v. Gordon*, 467 F.2d 602, 607 (2nd Cir. 1972). Rule 9(b) deters allegations of fraud simply to obtain wider discovery or as "a pretext for discovery of unknown wrongs." *Gross v. Diversified Mortgage Investors*, 431 F. Supp. 1080, 1087 (S.D.N.Y. 1977), *aff'd*, 636 F.2d 1201 (2nd Cir. 1980).

Durbin cannot claim it amended its complaint by the trial testimony. A plaintiff must plead fraud with particularity to advise the defendant "*in advance of trial* exactly what the defendant is called upon to defend against." *Morrison Assurance Co. v. North American Reinsurance Corp.*, 588 F. Supp. 1324, 1329 (N.D. Ala. 1984), *aff'd*, 760 F.2d 279 (11th Cir. 1985) (emphasis supplied by court). Alabama also follows this rule in fraud cases. *State Farm Fire & Casualty Co. v. Fincher*, 454 So. 2d 936 (Ala. 1984).

The complaint did not allege and was never amended after discovery to allege that the acquisition or investment selection expenses were expenses which caused Durbin to lose a dividend, as is the gravamen of plaintiff's expert's testimony at trial. The complaint further did not state the allegation that 28% retention is fraudulent. Rule 9(b) mandates this specificity. The trial court abused its discretion and erred.

The Eleventh Circuit holds that a party waives its rights under Rule 9(b) if it conducts "extensive pre-trial discovery." The Eleventh Circuit takes this position to "harmonize the directives of Rule 9(b) with the broader policy of notice pleading." *Marshall Durbin Food Corp. v. Equitable Life Assurance Society of the United States*, 834 F.2d 949, 955 (11th Cir. 1987); *Friedlander v. Nims*, 755 F.2d 810, 813 & n.3 (11th Cir. 1985). The Eleventh Circuit fails to consider in this "harmonizing" that Rule 9(b) is an element of notice pleading. Rule 9(b) is and was an integral part of the Federal Rules of Civil Procedure when adopted so as to create notice pleading in federal courts. Since Rule 9(b) is, therefore, part of notice pleading rules, Durbin cannot be said to have met the requirements of notice pleading when it failed to follow Rule 9(b). Nothing in Rule 9(b) states that a party waives its right to the requirements of Rule 9(b) by conducting discovery. There must be a specific rule on such waiver before a party can be said to have waived its rights, such as the waiver found in Federal Rule of Civil Procedure 12(h).

III. The assessment of punitive damages here is prohibited by ERISA, 29 U.S.C. § 1001 *et seq.*

This case arises from an employer funded employee benefit plan. Durbin served as the employer and as the plan sponsor, and had discretionary control, including the ability to change insurers, which led to this case. Durbin, therefore, was a fiduciary under ERISA. Punitive damages are prohibited under ERISA, including cases arising over interpretation of an insurance policy. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. ....., 107 S. Ct. 1549 (1987), interpreting 29 U.S.C. § 1144(a).

In *Dedeaux*, the plaintiff alleged tortious breach of contract just as Durbin alleged in Count One of its complaint. (Record, Vol. I, pp. 1-4). In *Dedeaux* the plaintiff alleged fraud in the inducement, just as in Durbin's Count Two. *Id.*

ERISA's preemption clause is construed in its broadest sense. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96-97 (1983). Fraud

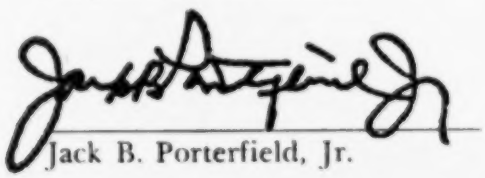
claims "relating to" an employee benefit plan are governed by ERISA. *Mid America Hotel Corp. v. Bernstein*, 664 F. Supp. 384, 385 (N.D. Ill. 1987).

Thus, ERISA prohibits the imposition of punitive damages here because ERISA pre-empts the state tort of fraud pleaded by Durbin. This Court should direct the court of appeals to follow ERISA so as to provide uniform enforcement of that statute nationwide.

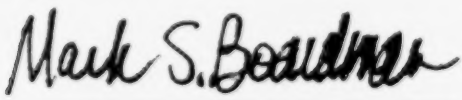
CONCLUSION

The petition for a writ of certiorari should be granted in order to resolve the constitutionality of punitive damages, the applicability of Federal Rule of Civil Procedure 9(b), and the enforcement of ERISA.

Respectfully submitted,



Jack B. Porterfield, Jr.



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APPENDIX

U.S. CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. CONSTITUTION, AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U. S. CONSTITUTION, AMENDMENT XIV, SECTION I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. CONSTITUTION, ARTICLE I, SECTION 10

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligations of contracts, or grant any title of nobility.

EMPLOYMENT RETIREMENT INCOME SECURITY ACT, § 514(a), 29 U.S.C. § 1144(a)

Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USC § 1003(a)] and not exempt under section 4(b) [29 USC § 1003(b)]. This section shall take effect on January 1, 1975.

ALABAMA CONSTITUTION, ARTICLE I, SECTION 1

Sec. 1. That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.

ALABAMA CONSTITUTION, ARTICLE I, SECTION 6

Sec. 6. That in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either; to demand the nature and cause of the accusation; and to have a copy thereof; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to testify in all cases, in his own behalf, if he elects so to do; and, in all prosecutions by indictment, a speedy, public trial, by an impartial jury of the county or district in which the offense was committed; and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty, or property, except by due process of law; but the legislature may, by a general law, provide for a change of venue at the instance of the defendant in all prosecutions by indictment, and such change of venue, on application of the defendant, may be heard and determined without the personal presence of the defendant so applying therefor; provided, that at the time of the application for the change of venue, the defendant is imprisoned in jail or some legal place of confinement.

ALABAMA CONSTITUTION, ARTICLE I, SECTION 15

That excessive fines shall not be imposed, nor cruel or unusual punishment inflicted.

ALABAMA CONSTITUTION, ARTICLE I, SECTION 22

That no ex post facto law, nor any law, impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment.

Federal Rule of Civil Procedure 9(b)

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7307

D.C. Docket No. 84-2646

MARSHALL DURBIN FOOD CORPORATION,
a corporation,

Plaintiff-Appellee,

versus

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Alabama

Before FAY, Circuit Judge, HENDERSON*, Senior Circuit Judge, and FORRESTER**, District Judge.

JUDGMENT

This case came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that defendant-appellant pay to plain-

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*See Rule 34-2 (b), Rules of the U. S. Court of Appeals for the Eleventh Circuit.

**Honorable J. Owen Forrester, U. S. District Judge for the Northern District of Georgia, sitting by designation.

tiff-appellee, the costs on appeal, to be taxed by the Clerk of this Court.

Entered: December 23, 1987
For the Court: Miguel J. Cortez, Clerk

By: /s/ KARLEEN MCNABB
Deputy Clerk

ISSUED AS MANDATE: FEB 9 1988

MARSHALL DURBIN FOOD CORPORATION,
a corporation,
Plaintiff-Appellee,

v.

The EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
Defendant-Appellant.

No. 86-7307.

United States Court of Appeals, Eleventh Circuit.

Dec. 23, 1987.

Jack B. Porterfield, Jr., Mark S. Boardman, Birmingham, Ala., for defendant-appellant.

Frank M. Young, III, Haskell, Slaughter, Young & Lewis, Jonathan H. Waller, Birmingham, Ala., for plaintiff-appellee.

Appeal from the United States District Court For the Northern District of Alabama.

Before FAY, Circuit Judge, HENDERSON*, Senior Circuit Judge, and FORRESTER,** District Judge.

FAY, Circuit Judge:

This appeal challenges whether there was sufficient evidence of fraud or breach of contract for a reasonable jury to render a verdict awarding actual and punitive damages. The Marshall Durbin Food Corporation ("Durbin") brought a diversity action against the Equitable Life Assurance Society of the United States ("Equitable") for the recovery of surplus insurance premiums allegedly due to Durbin under a retrospective premium agreement. The jury returned a verdict for Durbin. Because we find that the evidence presented was sufficient to support the jury verdict, we affirm.

*See Rule 34-2 (b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable J. Owen Forrester, U.S. District Court Judge for the Northern District of Georgia, sitting by designation.

BACKGROUND

Effective January 1, 1976, Equitable issued to Durbin three group policies, including a group health insurance policy. Equitable divided Durbin's group health insurance premium into two basic categories, projected claims and retention. "Projected Claims" represented an estimation by Equitable's actuaries of Durbin's incurred claims for the applicable policy year. "Retention" consisted of monies reserved for Equitable's costs and expenses in handling the claims.

The group health policy included a document known as a retrospective premium adjustment rider ("retro-rider"). Under the retro-rider, when the incurred claims exceeded the projected claims, Durbin would pay Equitable an additional premium to cover the difference.[1] The retro-rider did not specify what would happen if incurred claims were less than projected claims.[2]

Upon obtaining coverage, Durbin inquired whether Equitable would pay a refund if Durbin's actual claims were less than expected. On June 11, 1976, Equitable responded with a letter to Durbin explaining how the retro-rider would operate. It stated that "[i]n the event the claims should be less than 82%, the dividend would be paid to bring your rate up to at least 82%. Of course, all the above is subject to renewal each year on the anniversary date of your policy. . . ."[3]

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[1]Equitable expressed projected claims and incurred claims as percentages of the billed premium and referred to them as the "objective loss ratio" and the "actual loss ratio" respectively. For example, in policy year 1981 the billed premium was $854,621. The projected claims were $750,357 or 87.8% of the billed premium (the objective loss ratio). Incurred claims totaled $787,853 or 92.2% of the billed premium (the actual loss ratio). In this policy year Durbin paid Equitable a retrospective "pickup" premium to compensate for the excess incurred claims over projected claims.

[2]The relevant section of the retro-rider states: "If on any adjustment date the ratio of such total amount of Billed Premiums is greater than [the objective loss ratio for the applicable policy year], a retrospective premium adjustment shall be due to the Society as of that date. . . ."

[3]Eighty-two percent (82%) was the objective loss ratio for policy year 1976.

At this time, Durbin also asked Equitable for a breakdown of the charges that made up retention. Equitable responded with a letter which itemized first year acquisition expenses of $24,549. Thereafter, Equitable sent Durbin annual breakdowns of the amounts included in retention. Significantly, acquisition expense was not listed on any of these subsequent itemizations until Durbin terminated the policy.

In 1978, Equitable changed the policies' annual anniversary date from January 1 to April 1. The policies continued in effect through the last annual anniversary date of April 1, 1982, and then for a final three month period through June 30, 1982, referred to as the "Final Policy Period."

In policy years 1976, 1977, 1978 and 1981 Durbin's incurred claims exceeded projected claims, and Durbin paid additional retrospective "pickup" premiums to Equitable in those years. In policy years 1979 and 1980, however, incurred claims were less than expected, and Equitable paid Durbin return premiums of $39,415 and $19,201 respectively. Equitable identified these monies as "dividend or retroactive rate refunds."

By September, 1980 Durbin had become dissatisfied with Equitable's insurance program. Durbin asked Equitable whether it would be penalized if it terminated its coverage. Equitable responded that a dividend calculation would be made upon termination and that Durbin would not receive any penalty. Equitable also stated that in the event of termination it would treat Durbin "the same way that [it] had in the past."

Effective June 30, 1982, Durbin terminated its insurance coverage. During the Final Policy Period, Durbin's incurred claims were $51,594 less than the projected claims, but Equitable did not return a surplus premium to Durbin.[4] Instead, in September, 1983 Equitable billed Durbin for a retrospective

[4]Durbin's billed premium during the three month Final Policy Period was $291,342. The objective loss ratio for the 1982 policy year was 87.8% representing projected claims of $255,798 for the three month period. The incurred claims for this period totaled $204,204 or 70.1% of the billed premium. The difference between projected and incurred claims was $51,594.

"pickup" premium of $56,133. Equitable later offered to consider this discrepancy a "wash."

Durbin requested information showing the final figures of the Final Policy Period. In December, 1983 Equitable's responding letter revealed that Equitable charged a total of $81,603 (or 28% of the billed premium) for retention. A breakdown of retention provided in January, 1984 disclosed two extraordinary items – "balance of acquisition expense" in the amount of $20,462 and "investment selection charge" in the amount of $19,722. Equitable refused Durbin's request to refund any premium or dividend.

On October 25, 1984, plaintiff Durbin filed suit against Equitable in the United States District Court for the Northern District of Alabama seeking to recover surplus premiums for the Final Policy Period. Count one alleged that Equitable breached its contract by refusing to pay Durbin a surplus premium due under the health policy's agreed formula for the computation of the retrospective premium adjustment. Count two alleged that Equitable fraudulently represented that it would determine whether a surplus premium is due in the same manner as during previous renewal periods, and that it would refund any surplus premium to Durbin upon termination of the group health policy.

A jury trial commenced on March 17, 1986. On March 20, 1986 the jury returned its verdict for Durbin awarding compensatory damages of $46,060 and punitive damages of $1,000,000.

DISCUSSION

The principal issue in this appeal is whether there was sufficient evidence presented in the trial court to submit the breach of contract and fraud issues to the jury. When reviewing the sufficiency of the evidence supporting a general jury verdict, we are not free to substitute our judgment for that of the jury. *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 679 n. 1

(11th Cir.1984). Rather, our inquiry is limited to determining "whether or not reasonable jurors could have concluded as this jury did based upon the evidence presented." *Id.* While making this determination, we are obliged to examine all the evidence and draw reasonable inferences in favor of the party prevailing in the district court. *Quinn v. Southwest Wood Products, Inc.*, 597 F.2d 1018, 1019 (5th Cir.1979).

A. Breach of Contract

[1] The trial court did not err in submitting the contract claim to the jury. Equitable asserts here as it did at trial that Durbin is not entitled to a dividend or retroactive rate refund. Equitable claims that it uniformly applies a national dividend formula to determine whether any insured receives a dividend. Accordingly, under the 1982 dividend formula, Durbin was not due a dividend notwithstanding the acquisition or investment selection expenses included in retention.

Durbin, on the other hand, contends that it is entitled to a retroactive rate refund for the Final Policy Period. Durbin claims that Equitable paid it a refund each year in which the actual loss ratio was less than the objective loss ratio, and that the amount of the refund equalled the billed premium minus retention and incurred claims. Durbin further asserts that by fraudulently including the acquisition and investment selection charge included in retention for the Final Policy Period, Equitable prevented it from receiving a dividend.

We disagree with Equitable's position on this issue. Compelling evidence presented at trial showed that the contract between the parties required Equitable to pay Durbin a retroactive rate refund when the actual loss ratio was less than the objective loss ratio.[5] Equitable calculated the dividend or re-

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[5]Equitable paid Durbin premium refunds or dividends in policy years 1979 and 1980. Durbin paid Equitable retro "pickup" premiums in policy years 1976, 1977, 1978 and 1981. The chart below summarizes yearly premiums retentions and claims:

turn premium paid in policy years 1979 and 1980 in the precise manner Durbin alleges. Specifically, Equitable subtracted incurred claims and retention from the billed premium; the remainder was the dividend or retroactive rate refund.

Further, evidence in the trial court showed that the parties agreed that Equitable's retention charges would not exceed the difference between one hundred percent (100%) of the billed premium and the objective loss ratio stated in the applicable retro-rider agreement. By assessing charges for "balance of acquisition" and "investment selection" in the Final Policy Period, Equitable caused retention to double to approximately 28% of billed premium. Retention charges had never before been more than 13.8% of the billed premium. Because the objective loss ratio for the 1982 policy year was 87.8%, the ratio of retention charges to premium should not have exceeded 12.2% of $291,342 (the billed premium) or $35,543.[6]

There was sufficient evidence such that a reasonable jury could determine that incurred claims during the Final Policy Period were less than projected claims and that Durbin was entitled to a retroactive rate refund. A reasonable jury could find that Equitable treated Durbin differently and penalized Durbin by assessing new and excessive retention charges upon termination.

	Total Premium	Objective Loss Ratio	Retention	Retention as % of Premium	Incurred Claims	Actual Losses as % of Premium
1976	393,513	82.0%	52,128	13.2%	371,771	94.4%
1977	566,145	82.0%	59,531	10.5%	465,495	82.2%
1978	472,329	82.0%	48,783	10.3%	402,682	85.25%
1979	500,420	85.2%	52,550	10.5%	402,011	80.3%
1980	507,125	85.2%	54,796	10.8%	416,867	82.2%
1981	854,621	87.8%	99,570	11.6%	787,853	92.2%
Final Policy Period	291,342	87.8%	81,603	28.0%	204,204	70.1%

[6]We note that in calculating its damages Durbin did not use the same method of calculating the retroactive rate refund as Equitable used in policy years 1979 and 1980. Instead, Durbin subtracted the maximum allowable retention (12.2% of the billed premium) of $35,543 from the actual retention of $81,603 leaving a difference of $46,060 in damages. We view this method as equally acceptable.

B. Fraud

[2] The trial court did not err in submitting the fraud claim to the jury. This Court has recognized that the elements of a cause of action for fraud under Alabama law are as follows:

> (a) a false representation concerning an existing material fact; (b) a representation which (1) the defendant knew was false when made, or (2) was made recklessly and without regard to its truth or falsity, or (3) was made by telling plaintiff that defendant had knowledge that the representation was true while not having such knowledge; (c) reliance by the plaintiff on the representation and that he was deceived by it; (d) reliance which was justified under the circumstances; (e) damage to the plaintiff proximately resulting from his reliance.

First Virginia Bankshares v. Benson, 559 F.2d 1307, 1313 (5th Cir.1977) (citations omitted), *cert. denied*, 435 U.S. 952, 98 S.Ct. 1580, 55 L.Ed.2d 802 (1978); *see also Neff v. Kehoe*, 708 F.2d 639, 642 (11th Cir.1983) (per curiam). To recover for fraud under Alabama law, which governs the substantive aspects of this diversity case, the plaintiff must establish that Equitable represented that it would calculate the dividend with respect to the Final Policy Period in the same manner as it had in the past, and that such promise was made with the present intent not to perform. *See Williams v. United Insurance Company of America*, 634 F.2d 813, 815 (5th Cir. Unit B 1981).[7] After careful review of the record, we believe that, at trial, Durbin presented sufficient evidence of actionable fraud by Equitable to satisfy each of the requisite elements for a fraud claim under Alabama law.

The evidence showed that Equitable's representations regarding retention charges and refund of premium were material. Misrepresentations relating to the price of a product or service can be material. *See Village Toyota Co. v. Stewart*, 433 So.2d

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[7]The holdings of Unit B of the Fifth Circuit bind the Eleventh Circuit. *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982).

1150, 1154 (Ala.1983) (per curiam). The misrepresentations upon which Durbin based its claims all related to Durbin's ultimate cost of purchasing group health insurance from Equitable. Because these false representations directly affected the price of insurance, they were material.

Evidence admitted at trial showed that Equitable knowingly made false representations. This Court recently recognized that under Alabama law an intent to deceive may be inferred from a showing that representations were made wilfully, recklessly or mistakenly. *Neff*, 708 F.2d at 642. Equitable expressly agreed that upon termination it would neither penalize nor treat Durbin differently than it had in the past. After charging Durbin for acquisition expenses in the first year, Equitable secretly accrued annual acquisition expenses on its books. Equitable never included such charges in its breakdowns of retention until the Final Policy Period.

When queried at trial about Equitable's motive and intent in concealing the deferred acquisition charges, Fred Bicknese, the Equitable underwriting manager responsible for Durbin's account, admitted that Equitable deferred these charges because disclosing all of them in the first year, "wouldn't paint us in a very favorable light." Equitable deferred substantial amounts of acquisition expenses, and later penalized Durbin by assessing those expenses only when Durbin terminated its policies. Contrary to its representation, Equitable knew that it would charge Durbin extraordinary expenses, and therefore, would not treat Durbin the same upon termination as it had at renewal. Clearer evidence of fraudulent intent is difficult to imagine.

The evidence at trial showed that Durbin reasonably relied upon Equitable's representations and that these false representations proximately caused Durbin's damages. We find that there was sufficient evidence presented in the trial court such that a reasonable jury could determine that Equitable committed an actionable fraud upon Durbin.

C. Other Issues Presented

Equitable asserts that the court erred in submitted both contract and tort claims to the jury. We disagree. Alabama law is clear that where the plaintiff does not seek to rescind a contract based upon fraud, but rather sues for breach of contract and fraud by the defendant in performing the contract, then both the contract and tort claims are proper for submission to the jury. *See Herring v. Prestwood*, 414 So.2d 52, 57-58 (Ala. 1982).

[3] Equitable argues that Durbin presented insufficient evidence to support a claim for punitive damages. It asserts that to support such a claim, Durbin must not only show that the alleged misrepresentation was committed with the intent to deceive, but that it was also gross, malicious and oppressive. Equitable is incorrect. Proof of intent to deceive alone is sufficient. *Washington National Insurance Co. v. Strickland*, 491 So.2d 872, 876 (Ala.1985); *American Honda Motor Co. v. Boyd*, 475 So.2d 835, 838-39 (Ala.1985). "[E]vidence of gross, malicious, or oppressive conduct need not be found before a jury can impose punitive damages. All that is necessary is that there be evidence to establish an intent to deceive or defraud on the part of the defendant." *Washington National*, 491 So.2d at 876. The evidence presented at trial was sufficient to establish Equitable's intent to deceive, thus supporting Durbin's claim for punitive damages.

Equitable next claims that the trial court erred in allowing an expert witness, Ron Collins, to testify on behalf of Durbin. We disagree. Prior to trial, Equitable filed a motion *in limine* seeking to exclude Collins' testimony or, in the alternative allowing Equitable to depose Collins and then present its own expert. The court granted the alternative relief requested by Equitable. Equitable deposed Collins then offered as an expert, Daniel McCarthy, who testified at length by deposition introduced at trial. The ruling of the trial court was proper, Equitable was afforded the opportunity to present expert testimony and we find no error.

Equitable then complains that it should have been allowed to further qualify Jean Rassel, its company representative at trial. The trial court, in the exercise of its discretion, properly limited testimony as to Rassel's qualifications. Federal Rule of Evidence 104 specifically provides that preliminary questions concerning the qualifications of a person to be a witness are properly determined by the trial court. The advisory committee's note to this Rule explains: "To the extent that these inquiries [regarding qualification of a person to be a witness] are factual, the judge acts as the trier of fact." Federal Rule of Evidence 611 provides the trial court with the authority to reasonably control interrogation of witnesses. This is all that the trial court did with respect to Rassel. Moreover, this limitation was proper because Equitable sought to offer Rassel as an expert, although Equitable had failed to previously identify her as such. Upon timely objection by Durbin, the court properly refused to allow Equitable to present Rassel as an expert. We find no abuse of discretion.

Finally, Equitable claims that it was "ambushed" at trial because Durbin's complaint did not plead fraud with particularity as required by Fed.R.Civ.P. 9(b). This claim is without merit because Equitable obtained extensive pretrial discovery dealing with Durbin's fraud claim. Further, the Pretrial Order specifically described the fraud claim. Indeed, the record shows that the trial court overruled plaintiff's motion to amend its complaint. When viewed in light of our limited standard of review, we cannot say that the district court abused its discretion by not requiring an amended complaint from the plaintiff. *Cf. Friedlander v. Nims*, 755 F.2d 810, 813 n. 3 (11th Cir. 1985) (directing courts to "harmonize the directives of rule 9(b) with the broader policy of notice pleading"). The parties were well aware of the issues involved including Durbin's claim of fraud.

D. Conclusion

In sum, we find that the trial court did not err in submitting

breach of contract or fraud claims to the jury. We hold that there was sufficient evidence presented for a reasonable jury to conclude as this jury did.

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 86-7307

MARSHALL DURBIN FOOD CORPORATION,

Plaintiff-Appellee,

versus

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

(JANUARY 29, 1988)

Before FAY, Circuit Judge, HENDERSON, Senior Circuit Judge, and FORRESTER*, District Judge.

PER CURIAM:

Appellant's petition for rehearing is denied.

ENTERED FOR THE COURT.

/s/ PETER T. FAY

United States Circuit Judge

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*Honorable J. Owen Forrester, United States District Judge for the Northern District of Georgia, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARSHALL DURBIN FOOD CORPORATION,	)	
Plaintiff,	)	
VS.	)	CIVIL ACTION
	)	NO. CV 84-C-2646-S
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,	)	
Defendant.	)	

Jury Verdict of March 20, 1986

"We, the jury, find in favor of the plaintiff Marshall Durbin Food Corporation, a corporation and against the defendant The Equitable Life Assurance Society of the United States and award compensatory damages in the amount of $46,060.00 and punitive damages in the amount of $1,000,000. Plus 6% interest due from August 1, 1983 to present date (compensatory only).

Record, Vol. I.

Entry of Judgment

Clerk's Court Minutes that plff Marshall Durbin Food Corp have & recover of deft The Equitable Life Assurance Society of the United States the sum of $1,046,060.00 in accord with verdict of jury this day filed as follows: "We, the jury, find in favor of the plff Marshall Durbin Food Corp., a corporation and against the deft The Equitable Life Assurance Society of the United States and award compensatory damages in the amount of $46,060.00 and punitive damages in the amount of

$1,000,000.00 plus 6% interest due from 8/1/83 to present date (compensatory only)"; and taxing costs against deft; further that deft pay direct to attys of record for plff the proceeds of judgment and costs recovered by plff and upon receipt thereof, plff's atts will satisfy said judgment, filed; Entered 3/20/86.

Record, Vol. I at 78.

87-1798

Supreme Court, U.S.
FILED
MAY 26 1988
SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court Of The United States

October Term, 1987

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
Petitioner,

v.

MARSHALL DURBIN FOOD CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT OF RESPONDENT MARSHALL DURBIN FOOD CORPORATION

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QUESTIONS PRESENTED

1. Whether this Court should review the issue of the constitutionality of a punitive damages award when that issue was not properly raised in the court below?
2. Whether there is any basis for a challenge to the sufficiency of pleadings under Rule 9(b) when the fraud claim was described in detail in the pretrial order and the Defendant had ample opportunity for, and conducted, extensive pretrial discovery on the fraud claim?
3. Whether this Court should review the issue of alleged ERISA preemption of the punitive damages award, when that issue was not properly raised below?
4. Whether ERISA has any application to the award of punitive damages in litigation between an employer and an insurance company *unrelated* to the beneficial aspects of an expired group insurance program?
5. Whether the Excessive Fines Clause of the Eighth Amendment applies to an award of punitive damages in a civil jury trial?
6. Whether the award of punitive damages in this case violates the Due Process Clause?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Jurisdictional Statement 1

Statement of the Case 2

Argument

I. The Issue Of Whether The Punitive Damages Award Violates The United States Constitution Should Not Be Considered By This Court Because It Was Not Properly Raised Below. 6

II. Durbin Provided The Information Required By Federal Rule Of Civil Procedure 9(b). 9

III. The Employee Retirement Income Security Act Does Not Preclude The Award Of Punitive Damages In This Case. 10

A. Petitioner Failed to Properly Raise Its ERISA Preemption Argument In the Eleventh Circuit Court of Appeals. 11

B. ERISA Does Not Preempt the Cause of Action or the Award of Punitive Damages In this Case. 12

IV. The Eighth Amendment Does Not Apply To An Award Of Punitive Damages In A Civil Case. 15

V. The Punitive Damages Award In This Case Does Not Violate Either Substantive Or Procedural Due Process. 18

Conclusion 20

TABLE OF AUTHORITIES

Cases: *Page*

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) 8

Banker's Life & Casualty Co. v. Crenshaw, No. 85-1765 (U.S. May 16, 1988) 6, 7, 8, 9, 11, 12, 15

City of Springfield, Mass. v. Kibbe, ... U.S. ....., 107 S.Ct. 1114 (1987) 7

Conley v. Gibson, 355 U.S. 41 (1957) 10

Consumer Prod. Safety Comm. v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 16

Dekle v. Vann, 223 So. 2d 30 (Ala. 1969) 18

Dempsey v. Auto Owners Ins. Co., 717 F.2d 556 (11th Cir. 1983) 19

Duignan v. United States, 274 U.S. 195 (1927) 7

Gulf Atlantic Life Ins. Co. v. Barnes, 405 So. 2d 916 (Ala. 1981) 18

Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986) 19

Illinois v. Gates, 462 U.S. 213 (1983) 8

Ingraham v. Wright, 430 U.S. 651 (1977) 15, 16, 17

J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557 (1981) 7

Lassiter v. Dep't. of Social Services, 452 U.S. 18 (1981) 17

Marshall Durbin Food Corp. v. Equitable Life Assurance Soc'y of the United States, 834 F.2d 949 (11th Cir. 1987) 2, 3, 4, 5, 10, 14, 18, 20

Martori Bros. Dist. v. James-Massengale, 781 F.2d 1349 (9th Cir. 1986) 13

Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 12

Mishkin v. New York, 383 U.S. 502 (1966) 8

TABLE OF AUTHORITIES — (Continued)

Cases: *Page*

Pension Benefit Guar. Corp. v. R. A. Gray and Co., 467 U.S. 717 (1984) 14

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. ....., 107 S.Ct. 1549 (1987) 11, 12, 14

Purcell Co. Inc. v. Spriggs Enterprises, Inc., 431 So. 2d 515 (Ala. 1983) 18

Rebaldo v. Cuoma, 749 F.2d 133 (2d Cir. 1984) 13

Saporito v. Combustion Engineering, Inc., 843 F.2d 666 (3d Cir. 1988) 10

Shaw v. Delta Airlines, 463 U.S. 85 (1983) 11, 12, 13, 14

Sommers Drug Stores v. Corrigan Enterprises, 793 F.2d 1457 (5th Cir. 1986) 13

Southern Life and Health Ins. Co. v. Smith, 518 So. 2d 77 (Ala. 1987) 9

Todd v. United Steelworkers of America, 441 So. 2d 889 (Ala. 1983) 19

U-Haul Co. of Alabama v. Long, 382 So. 2d 545 (Ala. 1980) 19

Youakim v. Miller, 425 U.S. 231 (1976) 7

Constitutional Provisions:

U. S. Const. Amend. V 6
U. S. Const. Amend. VIII 6, 15, 16
U. S. Const. Amend. XIV 6

Statutes:

29 U.S.C. § 1001 10
29 U.S.C. § 1001 (b) 12, 13
29 U.S.C. § 1001a (c) (3) 13
29 U.S.C. § 1001a (c) (4) 13
29 U.S.C. § 1102 15
29 U.S.C. § 1109 14
29 U.S.C. § 1132 (a) (2) 14

TABLE OF AUTHORITIES – (Continued)

Statutes:

	Page
29 U.S.C. § 1132(a) (3)	14, 15
29 U.S.C. § 1132(d) (1)	14
29 U.S.C. § 1144	12, 13
Ala. Code § 6-11-20	8, 9
Ala. Code § 6-11-21	9
Ala. Code § 6-11-23	9
Ala. Code § 6-11-24	9

Rules:

Fed. R. Civ. P. 9(b)	5, 9, 10
Fed. R. Civ. P. 59(f)	19
Fed. R. App. P. 40(a)	7

Other Authorities:

5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1291	10
120 Cong. Rec. 29197 (1974)	13
120 Cong. Rec. 29933 (1974)	13

No.

IN THE –

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THE EQUITABLE LIFE ASSURANCE SOCIETY
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MARSHALL DURBIN FOOD CORPORATION,
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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT OF RESPONDENT MARSHALL DURBIN FOOD CORPORATION

Respondent Marshall Durbin Food Corporation respectfully submits this brief in opposition to the issuance of a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

STATEMENT OF JURISDICTION

Respondent agrees with the Petitioner's allegations of this Court's jurisdiction to consider this petition, except that Respondent denies that the punitive damages and ERISA issues were properly raised in the court below.

CITATIONS TO OPINIONS BELOW

Respondent agrees with the Petitioner's citation of the sole written opinion in this case.

STATEMENT OF THE CASE

The relevant facts are clearly and succinctly stated in the decision of the Eleventh Circuit, which is the subject of this appeal. *Marshall Durbin Food Corp. v. Equitable Life Assurance Soc'y of the United States*, 834 F.2d 949 (11th Cir. 1987). These facts are briefly restated for convenience.

Equitable issued a group health insurance policy (the "policy") to Marshall Durbin Food Corporation ("Durbin") which became effective on January 1, 1976. This policy was renewed on an annual basis until it was cancelled effective June 30, 1982. The policy was experience rated; in other words, at the beginning of each policy period, Equitable projected that losses under the policy would be a specified percentage of the total premium. This percentage, also called the "objective loss ratio," was expressed in a document called the retrospective premium adjustment rider, or "retro rider," which was included in the policy.

The difference between the objective loss ratio and the total premium was reserved by Equitable as maximum retention charges. Retention is intended to cover the insurer's administrative and claim processing costs. Retention charges cannot be more than the difference between 100% and the objective loss ratio.

The retro rider provided that, when the actual incurred claims exceeded the projected claims under the policy, Durbin would pay Equitable an additional premium to cover the unanticipated losses. However, the rider made no reference to any action to be taken if the incurred claims were less than the projected claims.

Upon Durbin's initial inquiry at the time it obtained the policy, Equitable represented to Durbin that if Durbin's actual

claims were less than projected, then Equitable would refund the difference to Durbin. According to those representations, the refund of premium would be calculated by subtracting (a) the claims incurred and (b) the retention charges, from the amount of the total premium.

At the time it obtained coverage, Durbin also asked Equitable to provide a breakdown of the charges which constituted the retention portion of the premium. Equitable represented to Durbin that the first year acquisition expenses were $24,549.00. For each subsequent year in which the policy was renewed, Equitable purported to send Durbin annual breakdowns of the amounts which were included in the retention charge for that year; however, Equitable never included an acquisition expense on any of the subsequent retention breakdowns, even though Equitable was secretly carrying substantial deferred acquisition expenses on its books. Thus, Equitable misrepresented the fact that it was deferring additional acquisition expense charges.

Equitable also misrepresented to Durbin that if the policy was terminated, Durbin would not be penalized for termination, and would be treated the same way with regard to its premiums as it had been treated upon annual renewal of the policy.[1]

In the policy years 1976, 1977, 1978 and 1981, Durbin's incurred claims were in excess of the projected loss ratio. Thus, Durbin paid additional premiums ("pick-up" premiums) to Equitable for each of those years. However, the incurred claims for the policy years 1979 and 1980 were less than expected. Equitable paid Durbin return or refund premiums of $39,415.00 and $19,201.00, respectively, in those years.

Durbin terminated the policy with Equitable effective June

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[1]In the words of the Eleventh Circuit:

> Equitable responded that a dividend calculation would be made upon termination and that Durbin would not receive any penalty. Equitable also stated that in the event of termination it would treat Durbin "the same way that [it] had in the past."

834 F.2d at 951.

30, 1982. The final policy period ran from April 1, 1982 until June 30, 1982 (the "Final Policy Period"). During the Final Policy Period, Durbin's claims were substantially less than projected and Durbin was, therefore, entitled to a refund for the Final Policy Period, as in 1979 and 1980. However, Equitable improperly changed its method of calculating retention for the Final Policy Period, in an illegal attempt to nullify Durbin's entitlement to a premium refund.

Specifically, prior to the Final Policy Period, retention charges had never exceeded approximately 13% of billed premium. *See* 834 F.2d at 952 (chart). Because the objective loss ratio for the Final Policy Period was 87.8%, retention charges should not have exceeded 12.2% of the billed premium. However, for the Final Policy Period, Equitable added previously undisclosed retention charges for alleged "balance of acquisition expense" and "investment selection charges," which resulted in a total retention of $81,603 or 28% of billed premiums for the Final Policy Period. As the jury undoubtedly noted, this improper increase in retention was enough to cancel out a premium refund to Durbin. 834 F.2d 952-53.

Equitable never refunded any premium to Durbin for the Final Policy Period. The Final Policy Period was the first time that Equitable had ever asserted any charge for "balance of acquisition expense" or "investment selection charge."

Durbin filed suit against Equitable in the United States District Court for the Northern District of Alabama on October 25, 1984. Its complaint alleged breach of contract and fraud. The case was tried before a jury beginning on March 17, 1986. On March 20, the jury rendered a verdict awarding Durbin compensatory damages in the amount of $46,060.00 and punitive damages in the amount of $1,000,000.00. Equitable appealed to the United States Court of Appeals for the Eleventh Circuit. On December 23, 1987, the Eleventh Circuit affirmed the jury's verdict, including the award of punitive damages. Petitioner's Appendix ("Pet. App.") at A-3.

The Eleventh Circuit carefully analyzed Durbin's fraud claims; it found that there was abundant evidence presented

at trial to support the punitive damage award and, indeed, that "[c]learer evidence of fraudulent intent [was] difficult to imagine."[2]

The only issue regarding punitive damages which Equitable raised in the Eleventh Circuit prior to decision was allegedly "insufficient evidence." 834 F.2d at 954. Equitable completely failed to raise federal Constitutional issues regarding the punitive damages award until after the Eleventh Circuit's decision, in its Petition for Rehearing. Equitable also completely failed to raise an alleged ERISA preemption claim in the appeal briefs which it filed in the Eleventh Circuit prior to decision.

Finally, the Eleventh Circuit summarily rejected Equitable's alleged claim that fraud was not pleaded with sufficient particularity under Fed. R. Civ. P. 9(b).

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[2] Evidence admitted at trial showed that Equitable knowingly made false representations. This Court recently recognized that under Alabama law an intent to deceive may be inferred from a showing that representations were made wilfully, recklessly or mistakenly. *Neff*, 708 F.2d at 642. Equitable expressly agreed that upon termination it would neither penalize nor treat Durbin differently than it had in the past. After charging Durbin for acquisition expenses in the first year, Equitable secretly accrued annual acquisition expenses on its books. Equitable never included such charges in its breakdowns of retention until the Final Policy Period.

When queried at trial about Equitable's motive and intent in concealing the deferred acquisition charges, Fred Bicknese, the Equitable underwriting manager responsible for Durbin's account, admitted that Equitable deferred these charges because disclosing all of them in the first year "wouldn't paint us in a very favorable light." Equitable deferred substantial amounts of acquisition expenses, and later penalized Durbin by assessing those expenses only when Durbin terminated its policies. Contrary to its representation, Equitable knew that it would charge Durbin extraordinary expenses, and therefore, would not treat Durbin the same upon termination as it had at renewal. *Clearer evidence of fraudulent intent is difficult to imagine.*

834 F.2d at 954 (emphasis added).

I. The Issue Of Whether The Punitive Damages Award Violates The United States Constitution Should Not Be Considered By This Court Because It Was Not Properly Raised Below.

A majority of Equitable's Petition for a Writ of Certiorari (hereinafter "petition") is devoted to arguments that the jury's award of punitive damages in this case violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. However, Equitable failed to raise these issues in either the trial court or in its briefs on the merits to the Court of Appeals, but waited until its Petition for Rehearing to the appellate court.

This Court's recent decision in *Bankers Life & Casualty Co. v. Crenshaw*, Nos. 85-1765 (U.S. May 16, 1988), is indistinguishable in principle from the case presented here. In both cases, the petitioner attempted to belatedly raise constitutional issues which had not been raised or considered prior to the decision of the appellate court. This Court declined to consider these belated issues in *Crenshaw*, and should so decline here. This would maintain the incentive for litigants to assert all of their arguments in the courts below, and would serve to consistently apply the prudential concerns which were the basis for this Court's decision in *Crenshaw*.

Equitable had ample opportunity to raise the constitutional issues in the trial court, prior to its appeal to the U.S. Court of Appeals for the Eleventh Circuit. It did not do so.[2] In the Eleventh Circuit, Equitable's Brief on the merits and its Reply Brief do not identify or discuss a single constitutional provision on which Equitable now bases its Petition in this Court. Respondent's Appendix ("Res. App.") B and C, (excerpting all

[2] The first opportunity to raise the constitutional issues came when Equitable answered Durbin's Complaint, which asserted a right to punitive damages. Equitable filed an Answer and, several months later, an Amended Answer, but neither raised the constitutional issues. After the jury rendered its verdict for Durbin, Equitable filed a Motion for Judgment Notwithstanding the Verdict Or, In the Alternative, For a New Trial. The Motion perfunctorily enumerated 180 assignments of error, but never referred to the Constitution or any constitutional issues.

portions of these Equitable briefs relating to punitive damages).[4]

Only after the Court of Appeals issued its decision did Equitable raise the possibility of Constitutional defenses in a Petition for Rehearing. The Eleventh Circuit rejected Equitable's Petition for Rehearing, and Equitable now seeks to have this Court forgive its failure to timely raise these issues below. Dutton was precluded from objecting to Equitable's belated attempt to raise new issues in the appellate Petition for Rehearing, Fed. R. App. P. 40(a), but now asserts that these constitutional issues are not properly before this Court due to Equitable's failure to properly raise them below. *See City of Springfield, Mass. v. Kibbe*, __ U.S. __, 107 S.Ct. 1114, 1116 (1987) (respondent objected to petitioner's raising new issue at the first opportunity).

The general rule is that the Supreme Court will not ordinarily address an issue for the first time that was not addressed by the Court of Appeals. *E. Everett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 560 (1981); *see also Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("It is only in exceptional cases coming from the federal courts that questions not pressed or passed upon below are reviewed"), *quoting Duignan v. United States*, 274 U.S. 195, 200 (1927). In determining

[4]Review of these briefs shows that Equitable's total argument that the punitive damages were excessive is contained in one paragraph in each brief and is based, not on the Constitution, but "in light of allegations of small actual damages and New York and Alabama law on dividend allowances." Appellant's Brief on the Merits and Reply Brief, at Rec. Appx. at 28, 26. In line with this Court's recent ruling in *Cronchaw*, such a passing reference to state law, without any reference to the federal Constitution, is totally insufficient to preserve the issues which Equitable now seeks to raise. *Cronchaw*, slip op. at 5.

In its Petition to this Court, Equitable again attempts to obfuscate its constitutional issues by asserting "[i]n its appeal and petition for rehearing, Equitable raised the issue of the propriety of punitive damages and the excessiveness thereof and questioned the constitutionality of the punitive damages." Appellant's Petition for Writ of Certiorari ("Petition"), at 3. A review of the briefs, however, shows these issues were never discussed on appeal, but were raised only in the Petition for Rehearing.

whether to exercise jurisdiction over questions not properly raised below, the Court has focused on "a constellation of practical considerations, chief among which is our own need for a properly developed record on appeal." *Crenshaw*, slip op. at 7.

An obvious consequence of Equitable's failure to raise the constitutional issues in a timely fashion is that there is no record of consideration and analysis of these issues from the courts below. This Court has stated that the relationship between the Eighth and Fourteenth Amendments and the award of punitive damages must be resolved "in an appropriate setting." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 1589 (1986).

This case does not represent that setting since these issues involve "a question of some moment and difficulty," *Crenshaw*, at 7, and there are strong policy reasons for deciding such issues only when the Court has the benefit of a record produced in the crucible of argument before the trial and appeals courts. *See Illinois v. Gates*, 462 U.S. 213, 224 (1983) ("Where difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on our discretion.") These policy reasons are made even stronger in this case since the lack of a developed record is due to Equitable's failure to timely raise these issues despite the Court's recognition of them in *Aetna* in 1986. *See Mishkin v. New York*, 383 U.S. 502, 512-13 (1966) ("The far-reaching and important questions tendered by this claim are not presented by the record with sufficient clarity to require or justify their decision.")

Review should also be forestalled on the basis of comity to the States. The Alabama Legislature has shown its willingness to act specifically in the area of punitive damages. After the date on which Durbin was awarded compensatory and punitive damages against Equitable, the Legislature enacted an extensive package of legislation commonly referred to as "tort reform," one part of which concerned standards for and restrictions on punitive damage awards. *See Ala. Code* §§ 6-11-20 through 6-11-30 (Supp. 1987). The Legislature enunciated

standards concerning when punitive damages were allowable, restricted the amount of punitive damage awards with certain specified exceptions, and provided for a post-verdict hearing on punitive damages as well as *de novo* review of punitive damage awards by the trial judge and appellate courts. *See Ala. Code* §§ 6-11-20, 6-11-21, 6-11-23, 6-11-24 (Supp. 1987).

The Alabama Supreme Court has also indicated that it will review these issues if they are raised in the pleadings, pre-trial order, or as an objection to jury instructions.[5] *See Southern Life and Health Ins. Co. v. Smith,* 518 So. 2d 77, 82 (Ala. 1987) (Alabama Supreme Court refused to consider the constitutionality of a punitive damage award not properly raised in the court below). Therefore, appellate review of these untimely-raised issues is not only unwarranted, but unnecessary.

Durbin respectfully urges that this Court's decision in *Crenshaw* mandates that Equitable's petition be denied. The constitutional issues were not sufficiently raised below, and the prudential policy considerations set forth by this Court in *Crenshaw,* slip op. at 7-8, are directly applicable here. Just as the Court declined to decide important federal issues without the "benefit of a well developed record and a recent opinion on the merits" in the lower courts, *id.* at 8, the Court should likewise decline to do so here. Equitable is a sophisticated corporate entity with significant legal resources to assert any claims it may have. An attempt by such a party to assert claims at this late date, particularly in light of *Crenshaw*, should be rejected.

II. Durbin Provided The Information Required By Federal Rule Of Civil Procedure 9(b).

Equitable claims that the lower courts erred in permitting Durbin's fraud claims because they were not pled with the particularity required by Federal Rule of Civil Procedure 9(b). Petition at 14. However, when applying Rule 9(b)

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[5]As noted previously, Equitable failed to raise the constitutional issues at any of these times.

in light of the spirit of the Federal Rules, "focusing exclusively on its 'particularity language' is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the Rules." *Saporito v. Combustion Engineering, Inc.*, 843 F.2d 666, ___ (3d Cir. 1988). Rule 9 must be read in light of the basic pleading philosophy set forth in Rule 8. 5 C. Wright and A. Miller, *Federal Practice and Procedure* § 1291, at 389. Any failure to meet the special pleading provisions in Rule 9 can be corrected through the use of discovery procedures. *Id. See also Conley v. Gibson*, 355 U.S. 41, 47 (1957) (". . . simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures . . ."). The fact that Equitable had ample opportunity to, and did, avail itself of the liberal discovery provided for in the Federal Rules defeats its Rule 9(b) objection.

As the Eleventh Circuit noted, "Equitable obtained extensive pretrial discovery dealing with Durbin's fraud claim." *Marshall Durbin Food Corp. v. Equitable Life Assurance*, 834 F.2d 949, 955 (11th Cir. 1987) (Pet. App. A-3). In addition, the Pretrial Order specifically described Durbin's fraud claims. *See* Res. App. A at 4-6. In short, Equitable engages, at best, in hyperbole when it states to this Court that "[o]nly at trial did Equitable learn what it would be called on to defend itself against." Petition at 14. This claim was squarely and properly rejected by the Eleventh Circuit. 834 F.2d at 955.

III. The Employee Retirement Income Security Act Does Not Preclude The Award Of Punitive Damages In This Case.

As almost an afterthought to the other grounds raised in its Petition for Certiorari, Equitable now argues that the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA") precludes the award of punitive damages against Equitable. This case was not tried, either in the District Court or in the Court of Appeals, under ERISA. Neither was ERISA addressed by the Eleventh Circuit. Aside from the prudential

considerations which require that the petition for certiorari on this ground should be denied (*see infra* at 6-9), the Court should also deny certiorari on the ERISA issue under the holding in *Shaw v. Delta Airlines*, 463 U.S. 85 (1983).

A. *Petitioner Failed to Properly Raise Its ERISA Preemption Argument in the Eleventh Circuit Court of Appeals.*

As with the constitutional arguments, Equitable completely failed to raise the ERISA preemption issue until after the Eleventh Circuit Court of Appeals heard oral argument on this case. After briefing and argument, in a letter to the panel that decided this case, petitioner argued that ERISA preempted the punitive damages award, citing *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. ....., 107 S. Ct. 1549 (1987). (Res. App. D) Later, in Equitable's Petition for Rehearing, the ERISA issue was revisited.

Equitable's letter brief was not a timely assertion of the ERISA question. The ERISA statute itself became effective in 1975. At least three years prior to the trial date, this Court addressed the scope of the ERISA preemption clause. *See, e.g., Shaw v. Delta Airlines*, 463 U.S. 85 (1983). The idea that ERISA might preempt a state law claim was not, by any means, one that originated with this Court's decision in *Pilot Life*.

The prudential considerations addressed in *Banker's Life and Casualty Co. v. Crenshaw*, No. 85-1765 (U.S. May 16, 1988) mandate that this Court decline review of Equitable's belated ERISA claim. Among the practical considerations cited in *Crenshaw* as justification for the "not pressed or passed upon below" rule, *id.* at 7, is the "need for a properly developed record on appeal." *Id.* There is no indication whatsoever that the Eleventh Circuit even considered this argument. Certainly, there is no discussion of ERISA in the decision. In light of the relative complexity of the ERISA statute, and the fact that the case law construing it is far from settled, it would be preferable for this Court's review of any ERISA question to "gain the benefit of a well-developed record and a reasoned opinion on

the merits." *Crenshaw*, slip op. at 8. This is clearly not the appropriate case for that review.

B. *ERISA Does Not Preempt The Cause of Action or the Award of Punitive Damages in this Case.*

The ERISA statute contains a broad preemption clause. 29 U.S.C. § 1144(a); *see* 107 S.Ct. at 1551-52. Section 1144(a) provides that ERISA

> "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . ."

29 U.S.C. § 1144(a). For purposes of § 1144(a), "state laws" include the decisional or common law as well as the statutory law of the states. 29 U.S.C. § 1144(c)(1).

Nonetheless, the case at bar does not fall under this provision. Durbin's suit against Equitable is based upon Equitable's tortious refusal to pay a premium refund to Durbin after Durbin cancelled a group insurance policy issued by Equitable. 834 F.2d at 951. Neither the allegations of the complaint nor the proof at trial have any connection whatsoever with the improper payment or refusal to pay a *claim* for benefits under an employee benefit plan. *Cf. Pilot Life* at 1551; *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985). Durbin's allegations in this litigation concern the cancellation of the policy purchased by Durbin from Equitable, *and not the beneficial aspects of the employee benefit plan.* There is nothing about this case which would invoke the Congressional concern with the protection of "participants in employee benefit plans and their beneficiaries . . ." 29 U.S.C. § 1001(b).

This Court has recognized that state laws which relate to an employee benefit plan in only a peripheral sense are outside the scope of the ERISA preemption. *Shaw v. Delta Airlines*, 463 U.S. 85, 99 n.21 (1983). If a state law bears such an attenuated relationship to an employee benefit plan that Congress could not reasonably have contemplated that preemption would take place, then § 1144(a) will not operate to supersede the state law. *See* 463 U.S. at 98-99.

In *Shaw*, this Court addressed the meaning of the provision in § 1144(a) that ERISA preempts state laws which "relate to" an employee benefit plan. 463 U.S. at 97. Acknowledging that Congress used the phrase "relate to" in a "broad sense", the Court went on to cite the remarks of two of the bill's sponsors which highlighted the fact that the ERISA preemption clause was specifically intended to

> "*round out the protection afforded participants* by eliminating the threat of conflicting and inconsistent State and local regulation." 120 Cong. Rec. 29197 (1974).

463 U.S. at 99 (remarks of Representative Dent) (emphasis added.) Further, the Court quoted Senator Williams' statement that preemption would

> "eliminat[e] the threat of conflicting or inconsistent State and local *regulation of employee benefit plans.*" *Id.* at 29933.

(footnote omitted) (emphasis added).

The cancellation of the insurance policy involved in this lawsuit in no way threatens the ERISA scheme by allowing inconsistent state regulations. *See id.* Its relationship, if any, to the plan is "too tenuous, remote [and] peripheral to warrant a finding that the law 'relates to' the plan." 463 U.S. at 99 n.21. *See also id.* at 98 n.17.[6]

The Court's statements in *Shaw* are supported by the legislative history as well as the Congressional findings and declaration of policy for ERISA. *See* 29 U.S.C. § 1001(b) and § 1001a (c) (3) and (4); 463 U.S. at 99. The declarations of policy and intent found in the statute, as well as the statements by

[6]At least three of the Circuit Courts of Appeal have ruled that ERISA did not preempt state laws affecting employee benefit plans in only a tangential manner. *See, e.g., Martori Bros. Dist. v. James-Massengale,* 781 F.2d 1349 (9th Cir. 1986) ("make-whole" awards calculated with reference to fringe benefits not a subject of preemption); *Rebaldo v. Cuomo,* 749 F.2d 133 (2d Cir. 1984) (ERISA did not preempt cooperative demonstration project to contain hospital costs); *Sommers Drug Stores v. Corrigan Enterprises,* 793 F.2d 1457 (5th Cir. 1986) (ERISA did not preempt state common law of corporate fiduciary duty).

the two sponsors quoted in *Shaw*, show that the target of ERISA's protective provisions is the covered work force. Congress enacted the comprehensive scheme for the purpose of insuring that employees, retirees and their dependents would not be injured or left destitute by virtue of the mishandling of pension funds and other benefit plans. *See id.*; *Pension Benefit Guar. Corp. v. R. A. Gray and Co.*, 467 U.S. 717, 720 (1984). The preemption of state laws governing the contractual relationship of a corporation with a group health insurer would serve none of the purposes for which ERISA was enacted.

To make the case against ERISA preemption even more compelling, any connection between Respondent and an employee benefit plan had been extinguished by the time the facts giving rise to Durbin's claims arose. This lawsuit came about as a result of Equitable's refusal to pay an agreed-upon dividend to Durbin which was due upon Durbin's *cancellation* of the policy. *Durbin*, 834 F.2d at 951. (Pet. App. A-3). Durbin also stated a claim for fraud in the inducement for Durbin to enter into the contract with Equitable. *Id.* By contrast, the tortious conduct in *Dedeaux* was the insurer's termination of long-term disability benefits due to the plaintiff employee. 107 S.Ct. at 1551.

Aside from the fact that this case does not "relate to" an employee benefit plan, the possibility of ERISA preemption is also foreclosed by the more obvious lack of any ERISA cause of action available to Durbin under the facts of this case. The civil enforcement provision of ERISA does not empower an "employer" *per se* to sue under the statute. Rather, it empowers only the Secretary of Labor, a fiduciary, a beneficiary, a participant, or the plan itself, to bring suit. 29 U.S.C. § 1132(a) and (d)(1). Respondent would have standing to sue only as a fiduciary under § 1132(a)(2) and § 1109, for breach of fiduciary duties, or § 1132(a)(3), for equitable relief. Since the policy at issue was no longer in existence as an employee benefit plan at the time this cause of action arose, Durbin could not have brought suit as a fiduciary. § 1132(a)(2). In addition, as the plan no longer existed, there was no basis

for any claim for equitable relief under § 1132(a)(3). There was no standing available to Respondent to sue for breach of fiduciary duty for the additional reason that, assuming that Equitable had originally qualified as a plan fiduciary under § 1102, it would no longer qualify as a fiduciary after the plan had been cancelled and the cause of action arose. It follows, then, that this cause of action could not possibly be preempted by ERISA as there is no ERISA cause of action available to Durbin for the loss it incurred, at the time it occurred.

In sum, there is no evidence in this case that any employee or other plan beneficiary has been harmed in any way or denied any benefit which ERISA is intended to protect. Only Durbin was harmed. The State law applied in this case does not "relate to" an employee benefit plan in a manner which invokes ERISA's preemption provision. Therefore, the petition for writ of certiorari on this issue is due to be denied.

IV. The Eighth Amendment Does Not Apply To An Award Of Punitive Damages In A Civil Case.

Petitioner asserts that the Excessive Fines Clause of the Eighth Amendment prohibits the award of punitive damages affirmed by the Eleventh Circuit in this case. However, the history of the Eighth Amendment and of this Court's decisions on that aspect of the Constitution belie the Petitioner's argument. The Amendment is clearly inapplicable to civil jury verdicts. It is noteworthy that Petitioner has not cited a single case to the contrary. *See generally* Brief of Appellee at 37-43, *Bankers Life and Casualty Co. v. Crenshaw*, No. 85-1765 (U.S. May 16, 1988).

The Eighth Amendment contains three prohibitions, forbidding the imposition of cruel and unusual punishment, excessive bail and excessive fines. *U.S. Const. Amend.* VIII. The Excessive Bail Clause has its only possible application in a criminal setting. The Cruel and Unusual Punishment Clause, likewise, applies in a criminal context. *See Ingraham v. Wright*, 430 U.S. 651 (1977). This leaves the Excessive Fines Clause which, when

read in context according to the ordinary meaning of the language used, should be interpreted only as another limitation on the state's power to impose criminal sanctions or penalties. Any other reading would constitute a strained interpretation of the Amendment which ignores the common understanding of the three prohibitions. This Court should give effect to the plain language of the Amendment unless there is good reason to believe that the Framers of the Constitution intended it to have some meaning different from that of the usual meaning of the words used. *See Consumer Product Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Though this Court has never ruled on the question of whether the Eighth Amendment is applicable in any context other than criminal sanctions or punishments that are paid to or imposed by the government, the decision in *Ingraham v. Wright*, 430 U.S. 651 (1977), indicates that the Amendment should not be otherwise applied. In *Ingraham*, the plaintiffs challenged the use of corporal punishment as a means of maintaining discipline in the Florida schools, claiming that the paddling of students constituted cruel and unusual punishment in violation of the Eighth Amendment. The Court concluded that corporal punishment imposed by public school teachers and administrators was not a proper subject of Eighth Amendment scrutiny. 430 U.S. at 671.

In reaching this conclusion, the Court examined the history of the Eighth Amendment, including the Excessive Fines Clause. Though the holding in *Ingraham* was directed only to the Cruel and Unusual Punishment Clause, the Court noted that the entire Amendment has traditionally been viewed as a limitation on the state's power to impose criminal sanctions.

> Bail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government.

430 U.S. at 664. Since the time of Blackstone, all three of the prohibitions contained in the Eighth Amendment have been

treated as "bearing only on criminal proceedings and judgments." *Id.* at 665. The Court even noted that the Eighth Amendment, which was the American adaptation of a proviso contained in the English Bill of Rights of 1689, was, like its English forebear, intended to apply to "the criminal process." *Id.* at 666.

There are important differences between the punishment and procedures associated with a criminal conviction, and punitive sanctions available in civil litigation, which justify the refusal to extend the constitutional protections of the Eighth Amendment to civil proceedings that do not involve the imposition of a disability by the government itself. In *Ingraham*, the court recognized the additional burden and the significant stigma imposed by a criminal conviction, particularly when that conviction is accompanied by punishment of any kind. 430 U.S. at 669. That stigma is one which runs to an individual, not to a corporation; clearly, it is the individual that the Framers intended to protect with the Eighth Amendment. There is no appropriate comparison between the imposition of a criminal conviction and the imposition of a civil judgment for punitive damages. The judgment may be paid and is then extinguished save for the judicial opinions rendered in its connection to serve as legal precedent. A criminal conviction, however, remains on the individual's record forever. *See id.*

V. The Punitive Damages Award In This Case Does Not Violate Either Substantive Or Procedural Due Process.

This Court's decisions defining the scope of the Due Process Clause are based on the notion that legal deprivations of life, liberty or property should be carried out with "fundamental fairness." *Lassiter v. Dep't. of Social Services*, 452 U.S. 18, 25 (1981). The jury's decision to award one million dollars in exemplary damages against the Petitioner in no way violates this provision, either substantively or procedurally.

These deliberations were attended with all of the "fundamental fairness" provided for by the Due Process Clause. Certainly Petitioner cannot claim that it was deprived of adequate procedural due process after receiving:

(1) "[E]xtensive pre-trial discovery dealing with Durbin's fraud claim," 834 F.2d at 955;

(2) The appropriate application of the Federal Rules of Civil Procedure and the Federal Rules of Evidence;

(3) A jury trial; and

(4) A full appeal to the Eleventh Circuit Court of Appeals. *See* 834 F.2d 949.

In short, Petitioner received a full-blown evidentiary hearing and the full panoply of rights to cross examination, presentation of witnesses and jury selection.

As to the substantive aspect of the Due Process Clause, Petitioner also shows no evidence of deprivation. Contrary to the statement in the petition that "fundamental fairness is violated by the vagueness of the criteria for determining punitive damages and the failure of the law to put all people on notice of what activities will suffer punitive damages," Petition at 8, the assessment of punitive damages is governed by definite standards under Alabama law. Petitioner's argument ignores these important safeguards.

First, Alabama law requires that there may be no award of punitive damages absent an actual injury. *Purcell Co. Inc. v. Spriggs Enterprises, Inc.*, 431 So. 2d 515 (Ala. 1983). The issue of punitive damages may not even be submitted to the jury without proof of actual damage. *Id.* Furthermore, Alabama law requires that the jury must find that the defendant's act involves malice, wilfulness, wantonness or some other aggravating circumstance before it may assess exemplary damages. *Gulf Atlantic Life Insurance Co. v. Barnes*, 405 So. 2d 916 (Ala. 1981); *Dekle v. Vann*, 223 So. 2d 30 (Ala. 1969). Also, an award of punitive damages may be overturned by the trial court or on appeal if it is clearly "the result of passion or preju-

dice" on the part of the jury. *U-Haul Co. of Alabama v. Long*, 382 So. 2d 545 (Ala. 1980).

The Alabama courts also require that the amount of punitive damages should be based on a determination of the enormity of the wrong which was inflicted upon the plaintiff. *See Todd v. United Steelworkers of America*, 441 So. 2d 889 (Ala. 1983). In other words, the jury's discretion over the amount of punitive damages to be awarded is not absolute; either a remittitur or a new trial should be ordered when there is an improper award of damages. *Dempsey v. Auto Owners Ins. Co.*, 717 F.2d 556 (11th Cir. 1983) (interpreting Alabama law).

Under Alabama law, trial judges are required to "reflect in the record the reasons for interfering with a jury verdict, *or refusing to do so*, on grounds of excessiveness of the damages." *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986) (emphasis added). *See also infra* at 8-9 (discussion of effect of Alabama tort reform statutes on punitive damages.) In *Hammond*, the Alabama Supreme Court enumerated several factors which the trial court should consider in passing upon the excessiveness of the jury verdict, including the nature of the defendant's conduct, the desirability of discouraging similar conduct and the impact upon the parties. *Hammond* at 1379. Remittitur is also available under the Federal Rules for excessive jury awards. *See* Fed. R. Civ. P. 59(f). Thus, the award of punitive damages under Alabama law in this case is not the kind of standardless, arbitrary action which would constitute a deprivation of substantive due process.

Finally, it is not an overstatement to say that any person, even a relatively unsophisticated one, who carries on any kind of business, may be charged with the knowledge that fraudulent activity may be the basis for a civil suit and significant punitive damages. There is no basis for Petitioner's argument that this award was unattended by appropriate notice of the charges against Equitable or by sufficiently clear standards. In order for the jury to assess punitive damages, it had to make a factual determination that the Petitioner's conduct was intentional.

See 834 F.2d at 953. The mere fact that this finding went against Petitioner does not make it "vague."

CONCLUSION

For the reasons stated herein, Respondent respectfully requests that this Court deny the petition for a writ of certiorari and allow the decision of the Eleventh Circuit Court of Appeals to stand.

Respectfully submitted,

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May 26, 1988

APPENDIX

APPENDIX A

PRETRIAL ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARSHALL DURBIN FOOD CORPORATION,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 84-C-2646-S
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,	)	
Defendant,	)	

PRETRIAL ORDER

A pretrial conference was held in the above case on January 23, 1986, wherein, or as a result of which, the following proceedings were held and action taken:

1. *Appearances.* Appearing at the conference were: Jonathan H. Waller, for the plaintiff; Jack B. Porterfield, Jr., and Mark S. Boardman, for the defendant.

2. *Jurisdiction and venue.* Subject matter jurisdiction exists under 28 U.S.C. § 1332 by reason of the amounts in controversy and the admitted diversity of citizenship. Personal jurisdiction and venue are not contested.

3. *Parties and trial counsel.* Any fictitious defendants are deleted; the parties before the Court are correctly named as set out below; and the designated trial counsel for the parties are as set out below:

	PARTIES	TRIAL COUNSEL
Plaintiff:	Marshall Durbin Food Corporation	Frank M. Young, III Jonathan H. Waller (HASKELL, SLAUGHTER, YOUNG & LEWIS)

Defendant:	The Equitable Life Assurance Society of the United States	Jack B. Porterfield, Jr., Mark S. Boardman (PORTERFIELD, SCHOLL, BAINBRIDGE, MIMS & HARPER); Michael W. Brody

4. *Pleadings.* The following pleadings have been allowed: plaintiff's complaint; defendant's answer to Count I of the complaint; defendant's answer to Counts II, III, and IV; defendant's amended answer, allowed on October 1, 1985; defendant's amended answer, allowed on November 15, 1985.

5. *Statement of the case.*

(a) *Agreed summary.* From 1976 through June 1982, Equitable issued to Marshall Durbin, certain group life, group accidental death and dismemberment benefits, and group health policies of insurance identified, respectively, as policy numbers 54907, 54906-D, and 54907-M or 54907-H. Equitable and Marshall Durbin entered into Retrospective Premium Adjustments with effective dates of January 1, 1976, April 1, 1979, April 1, 1981, and April 1, 1982. The Retrospective Premium Adjustments dated April 1, 1981 and April 1, 1982 amended only the group health insurance policy.

The policies became effective on January 1, 1976; were renewed on an annual basis; and were cancelled by Marshall Durbin effective June 30, 1982. The annual anniversary date was changed from January 1 to April 1, 1978. Thus, the last annual anniversary date was April 1, 1982. The policies were then in effect for a final three month period from the last annual anniversary date of April 1, 1982 through June 30, 1982 (the "Final Policy Period").

(b) *Plaintiff's position.*

(A) *Background Facts.* The Retro Agreements provide, in substance, that if the ratio of "Incurred Claims" to "Billed Premiums" (the "actual loss ratio") is higher than a stated percentage (the "objective loss ratio"), then Marshall Durbin would owe an additional premium to Equitable. The stated objective loss ratios in the 1976, 1979, and 1981 Retro

Agreements were .82 (or 82%), .852 (or 85.2%), and .878 (or 87.8%), respectively.

However, the converse — i.e., the refund of premiums in the event of favorable loss experience — was also an issue of importance to Marshall Durbin when the policies were initially obtained from Equitable. Marshall Durbin was specifically concerned with whether Marshall Durbin would receive a return of premium or a dividend, if loss experience was such that Incurred Claims were *less than* the specified percentage of Billed Premiums.

When Marshall Durbin obtained the Equitable coverage, Marshall Durbin received written assurances from Equitable that if the actual loss ratio was less than the objective loss ratio, then Equitable would pay or refund to Marshall Durbin an amount of Billed Premiums representing at least the difference between these ratios. Such a representation was contained in a letter dated June 11, 1976, from Mr. Clyde Jennings, Jr., then Divisional Group Manager of Equitable, to Marshall Durbin regarding the manner in which the Retro Agreements would operate.

In fact, in two subsequent years in which the actual loss ratio was less than the objective loss ratio, Equitable *did pay* substantial dividends or refund premiums to Marshall Durbin. Specifically, for policy year 1979 and policy year 1980, Equitable paid Marshall Durbin monies identified by Equitable as "dividend or retroactive rate refunds" in the amounts of $39,415.00 and $19,201.00, respectively, plus interest.

Following each annual policy period, Equitable provided Marshall Durbin with summaries of loss experience, premiums, dividends, and retention charges. Retention charges are charges by Equitable to Marshall Durbin for certain overhead or administrative expenses. These annual summaries are hereafter referred to as the "Policy Premium Summaries".

Based upon oral and written communications, and course of dealing between Equitable and Marshall Durbin, the parties agreed that Equitable's retention charges to Durbin would not exceed the difference between one hundred percent (100%) and the objective loss ratio stated in the applicable Retro Agreement.

In fact, up through and including the final annual policy period which ended on April 1, 1982, Equitable never assessed retention charges to Durbin which exceeded the difference between 100% of Billed Premiums and the applicable objective loss ratio.

(B) *Durbin's Breach of Contract Claims.* During the Final Policy Period, Marshall Durbin's actual loss ratio was substantially less than the applicable objective loss ratio of 87.8%. Thus, during the Final Policy Period retention charges should not have exceeded 12.2%. Accordingly, under the agreement between the parties, Marshall Durbin was entitled to a dividend or retroactive premium refund in the amount of at least the difference between the actual loss ratio and the objective loss ratio. The amount of dividend or return premium paid by Equitable should have been calculated by subtracting proper retention charges (i.e., no greater than 12.2% of Billed Premiums) plus Incurred Claims from Billed Premiums, with the balance or remainder representing the dividend or return premium properly payable to Marshall Durbin. Properly calculated, the dividend or return premium for the three month Final Policy Period should have been at least approximately $60,000.00.

However, Equitable wrongfully breached its agreement with Marshall Durbin by assessing retention charges against Marshall Durbin for the Final Policy Period in the amount of $81,603.00 or nearly 30% of Billed Premiums. This violated the agreement between the parties, based upon prior written correspondence, related oral discussions, and course of dealing, that retention charges would not exceed 12.2% when the objective loss ratio was 87.8%.

(C) *Marshall Durbin's Fraud Claims.* The Equitable, in bad faith, fraudulently induced Marshall Durbin to believe that (i) a retrospective premium adjustment or dividend calculation would be calculated in accordance with its prior agreements and past dealings upon termination of insurance coverage, (ii) dividends or refund premiums would be paid to Marshall Durbin, and (iii) Marshall Durbin would not incur any financial penalty upon termination of insurance coverage.

Marshall Durbin continued its coverage with Equitable, relying on representations of Equitable that Marshall Durbin would be paid surplus premiums following the termination of insurance coverage, without penalty by reason of such termination.

Equitable intentionally and in bad faith accepted the premiums of Marshall Durbin with the intent of making dividend calculations or retrospective premium adjustments, if Marshall Durbin terminated coverage, in a manner which materially penalized Marshall Durbin and which was contrary to the agreement and course of dealing between the parties.

Following the termination by Marshall Durbin of insurance coverage, effective June 30, 1982, Equitable applied a different dividend calculation than agreed upon by Marshall Durbin and Equitable, for the Final Policy Period. In this regard, Equitable, in bad faith, materially changed and altered its method of calculating retention charges to justify the figures utilized in the calculations by Equitable; moreover, Equitable initially concealed the wrongful manner in which Equitable materially altered its method of calculating retention charges for the Final Policy Period. In fact, although the Final Policy Period concluded on June 30, 1982, Eqqutable misrepresented the method and nature of its wrongful calculation of retention charges and the dividend until at least February, 1984 and Marshall Durbin did not know and could not reasonably have known of Equitable's fraudulent conduct until at least that time.

Moreover, during prior annual policy periods, Marshall Durbin requested explanations from Equitable regarding a "catch all" category of retention expenses shown on policy premium summaries as "balance of retention." Equitable misrepresented to Durbin the types and categories of expenses included in "balance of retention" and, further, expressly, impliedly, and by course of dealing misrepresented the manner in which Equitable assessed a type of retention charge against Marshall Durbin known as "acquisition expense."

Furthermore, Equitable affirmatively misrepresented to Marshall Durbin that, if Marshall Durbin terminated its

insurance coverage, then Equitable would assess new and different types of retention charges which would substantially increase retention charges assessed against Marshall Durbin, as a percentage of Billed Premium, and would materially penalize Marshall Durbin.

Equitable persisted in its misrepresentations to Marshall Durbin after Equitable became aware that Marshall Durbin was considering placing its insurance program with another insurance carrier, for the purpose of inducing Marshall Durbin to continue coverage with Equitable.

Equitable's fraudulent conduct is evidenced by correspondence in June and July, 1976, identified as deposition exhibits in the case, relating to the payment of dividends and relating to the types of expense that would be included in retention charges, and also correspondence from Equitable to Durbin in September, 1980 relating to calculation of a dividend or retroactive premium refund if the policies were terminated. The course of dealing referred to herein includes the fact that, prior to termination, Equitable paid dividends to Marshall Durbin in each year that the actual loss ratio was less than the objective loss ratio.

Marshall Durbin claims punitive charges in the amount of $10,00,000.00 by reason of Equitable's fraud.

(c) *Defendant's position.* The Retrospective Premium Adjustment does not provide the plaintiff with dividends, nor is the dividend formula a function of the Retrospective Premium Adjustment. If dividends are paid, they are paid because the defendant is a mutual company and are paid on all policies, not just those with retrospective agreements. No Retrospective Premium Adjustment or policy here provides for "retroactive rate refunds" or "refund of premiums."

The defendant denies that the Retrospective Premium Adjustment was altered in any way from the contracts signed by plaintiff and defendant, aside from amendments signed by plaintiff and defendant. Defendant denies all breach of contract claims and all fraud claims, pleads the general issue, and states that the fraud alleged is not pleaded with particularity so as to properly state a claim against Equitable.

Equitable pleads the one year statute of limitations on all tort claims and states that any tort actions for fraud should

have been filed within one year of termination of the contract (June 30, 1982).

Equitable pleads the defense of payment and says that all sums owed to plaintiff have been paid.

Equitable is compelled to respond to plaintiff's "Background Facts." Marshall Durbin misstates the actual loss ratio. In the Retrospective Premium Adjustment, the actual loss ratio is the ratio *between Incurred Claims under the health policy only* (the amount of claims and losses, including an estimate of incomplete and unreported claims), excluding any Pooled Insurance plus the amount of cumulative experience loss balance reduced by premium stablization plan reserves plus interest *as to Billed Premiums under the health policy.* If the actual loss ratio exceeds the objective loss ratio, then Marshall Durbin would owe Equitable an additional premium subject to the maximum specified in each retrospective agreement.

Equitable denies that Marshall Durbin ever made an issue of "the refund of premiums" as stated in the second paragraph of Plaintiff's position. Equitable does not offer and did not offer Marshall Durbin any contract with a provision for "refund of premiums."

In the third paragraph of plaintiff's position, Marshall Durbin states it received "written assurances." This apparently refers to a single item of correspondence, Clyde Jennings' (of Equitable) letter to Barry Justice of Marshall Durbin, dated June 11, 1976. This letter dealt only with the first year of the health policy and when there was no unfavorable loss experience. ("Loss Experience" is losses carried forward from previous years.) Further, this letter *did not* promise a dividend would be paid and *did not* tell Marshall Durbin that a refund of premiums was payable under the Retrospective Premium Adjustment.

Dividends are the product of a complex formula. Factors include total premiums paid, the claims incurred, interest rates, the cost of doing business, and other factors. Dividends are paid by Equitable even under policies which are not group insurance and which do not contain retrospective premium adjustment riders. In 1980 Equitable paid Marshall Durbin a dividend plus interest of $41,672 for the

policy year ending April 1, 1980. In 1981, Equitable paid Marshall Durbin a dividend plus interest of $19,848 for the policy year ending April 1, 1981. The above checks and their cover letters clearly identify these checks as dividends. Plaintiff's allegations in paragraph four of plaintiff's position are wrong and apparently arise from a misreading of a federal government form filled out annually for Marshall Durbin by Equitable.

Equitable did provide Marshall Durbin with yearly summaries of loss experience, premiums, dividends, and retention charges (the cost of doing business, also the product of a complex formula). Plaintiff has labeled these reports "Policy Premium Summaries", but these reports are actually a number of individual reports that do not have a collective name to identify them.

Equitable denies plaintiff's allegations in paragraph six of plaintiff's position. There was no course of dealing or oral or written communication limiting the amount of retention.

(1) *Plaintiff's Contract Claims.* Plaintiff claims a dividend for the final three months of the policy. Equitable denies this claim because dividends are a product of a formula that includes the cost of doing business in the last three months of the policy. Dividends are not the product of comparing the objective loss ratio to the actual loss ratio. Assuming, *arguendo*, that dividends are a product of comparing the objective loss ratio to the actual loss ratio as plaintiff alleges, then plaintiff's claim would only be for $9,403. Plaintiff's calculation is erroneous because plaintiff's calculation does not follow the dividend formula, but follows the misstated actual loss ratio described in paragraph one of plaintiff's position.

Equitable denies any agreement with Marshall Durbin that retention was limited in any way. Retention charges for the last three months of the policy, when stated as a percentage, may appear high because the yearly retention charges are compared to a three month period of claims, whereas all other percentages are compared to a one year period of claims.

The last paragraph of plaintiff's position, "B. Contract Claims", concerns interest, which is not identified by date,

not identified by amount, not identified as to principal, not identified in plaintiff's complaint and apparently not yet a claim against Equitable because plaintiff's allegations includes the word "may." This claims does not appear in plaintiff's complaint; Equitable is without knowledge of it and denies it.

(ii) *Plaintiff's Fraud Claims.* Plaintiff's fraud claims are restated in the same language of the complaint and are not specific as required by Fed.R.Civ.P. 9(b). Equitable denies that it made any misrepresentations, denies that plaintiff relied to its detriment, denies a duty (assumed or required by law) to advise Marshall Durbin, and denies that plaintiff took any action to its detriment. Equitable believes that the testimony of those who negotiated the policies will show that there is no fraud in the inducement and no discussion about "penalties." Marshall Durbin was not penalized upon termination. Equitable computed the dividend on termination as it had previously done.

Equitable denies that it made representations to Marshall Durbin to continue with coverage.

Marshall Durbin makes no argument that Equitable always failed to disclose retention charges, but states that Equitable delayed until February 1984. Equitable denies this. Even if true, this is not fraud.

Marshall Durbin makes conclusory allegations about misrepresentations of a "catch-all" category of retention. Equitable denies this. Even if true, there is no fraud because there is no detrimental reliance.

Marshall Durbin's position contains five paragraphs of conclusory allegations of failure to disclose or of suppression. Cited in these five paragraphs are two statutes of the *Alabama Code* which, together with the claim of failure to disclose, are not alleged in plaintiff's complaint. Equitable denies these allegations. Even if true, there is no fraud because Equitable had no duty or fiduciary duty to Marshall Durbin and Marshall Durbin did not rely to its detriment. Equitable denies it failed to educate and train its employees and agents. Even if true, this is not fraud. Equitable denies any practice of not disclosing material information. Equitable denies that

Marshall Durbin "lacked group insurance expertise." Even if these allegations are true, there is no fraud.

Equitable denies plaintiff's allegations in the next-to-last paragraph of plaintiff's position. The 1976 correspondence has already been discussed. The second letter of September 22, 1980, simply stated that the dividend calculation would be made at the time that the plaintiff decided to terminate the contract, but did not discuss how that dividend would be calculated. Equitable denies that any course of dealing created by contract or duty by Equitable to pay dividends to Marshall Durbin.

Plaintiff's last paragraph is an ad damnum of $10,000,000. None of the complaint's four counts contain an ad damnum exceeding five percent of that sum. Equitable denies that plaintiff is due any money.

6. *Discovery and other pretrial procedures.* The parties are given leave to proceed with further discovery provided it is commenced in time to be completed by March 10, 1986.

7. *Voir Dire questions and requested jury instructions.* When the case is called for trial, the parties shall present to the Court any special questions or topics for voir dire examination of the jury venire; and, to the extent the same can be anticipated, any requests for instructions to the jury (including extracts of any statutes on which instructions are requested).

8. *Special damages.* The parties shall by February 10, 1986, exchange lists itemizing all special damages claimed to have been incurred, showing the amount (and, where applicable, the method of computation) of such items.

9. *Witnesses.* The parties shall —

(a) By February 10, 1986, exchange lists stating the names and addresses of all expert witnesses whom they expect to offer at trial and stating, to the extent not previously provided, the information specified in FRCP 26(b)(4)(A)(i) with respect to any such person other than a medical expert; and

(b) By March 10, 1986, exchange lists stating the names and addresses of all witnesses (other than expert witnesses) whom they expect to offer at trial.

Unless specifically agreed between the parties or allowed by the Court for good cause shown, the parties shall be

precluded from offering substantive evidence through any witness not so listed. The listing of a witness does not commit the party to have such witness available at trial or to call such witness to testify, but does preclude the party from objecting to the call of such witness by another party. Except to the extent written notice to the contrary is given within five days after receiving such list, each party sahll be deemed to have agreed that the conditions of FRCP 32(a) (3) are satisfied with respect to the deposition of any listed medical expert or of any other person identified in the list as one whose testimony is expected to be offered by deposition.

10. *Exhibits.* The parties shall by March 10, 1986, exchange lists describing all writings, recordings, documents, bills, reports, records, photographs and other exhibits (collectively called "exhibits") which they may utilize at trial. Unless specifically agreed between the parties or allowed by the Court for good cause shown, the parties shall be precluded from offering as substantive evidence any exhibit not so identified. Except where beyond a party's control or otherwise impracticable (e.g., records from an independent third-party being obtained through subpoena), each party shall make such exhibits available for inspection and copying. Except to the extent written notice to the contrary is filed with the Clerk of the Court within five days after receiving such list, each party shall be deemed to have agreed (for purposes of this litigation only):

(a) that the originals of the listed exhibits are authentic within FRE 901 and 902;

(b) that a duplicate, as defined in FRE 1001, of the listed exhibits is admissible to the same extent as would the original;

(c) that any of the listed exhibits purporting to be records described in FRE 803(6) meet the requirements of such rule without extrinsic evidence;

(d) that any of the listed exhibits purporting to be correspondence were sent by the purported sender and received by the purported recipient on approximately the dates shown or in accordance with customary delivery schedules;

(e) that any listed photographs fairly and accurately portray the scene therein depicted as of the time when made;

(f) that any listed bills for services or materials are reasonable in amount for the services or materials therein billed; and

(g) that each of the listed documents is admissible at trial.

ORDERED, this 27th day of January, 1986, that the above provisions be binding on all parties unless modified by further order for good cause shown.

/s/ U. W. Clemon

UNITED STATES DISTRICT JUDGE
U. W. CLEMON

APPENDIX B

EXCERPTS FROM BRIEF OF APPELLANT THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

IN THE UNITED STATES
COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT COURT

MARSHALL DURBIN FOOD CORPORATION,	)	
Plaintiff-Appellee	)	
v.	)	Case No.: CV 86-7307
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,	)	
Defendant-Appellant.	)	

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF ALABAMA,
SOUTHERN DIVISION

BRIEF OF APPELLANT
THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES

No Preference Claimed

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TABLE OF CONTENTS

PAGE

CERTIFICATE OF INTERESTED PERSONS ii

STATEMENT REGARDING PREFERENCE iv

REQUEST FOR ORAL ARGUMENT v

TABLE OF CONTENTS vi

TABLE OF AUTHORITIES viii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 13

STATEMENT OF JURISDICTION 16

ARGUMENT 17

I. The Trial Court Erred in Submitting Fraud to the Jury 18

A. The expectation of dividends was not a fact material to Durbin's decision to establish or renew the policies 19

B. Equitable made no false representation 21

i. A miunderstanding is not fraud 27

ii. Equitable had no intent to misrepresent 28

C. Durbin did not rely to its detriment 30

D. Durbin should not have relied on two year old statements in terminating its policies 33

TABLE OF CONTENTS — (Continued)

PAGE

E. The alleged misrepresentation proximately caused no damage 34

F. Durbin's evidence is insufficient to support a claim for punitive damages 36

G. Assuming *arguendo,* a breach of contract, that is not fraud 38

II. The Trial Court Erred in Submitting the Contract Count to the Jury 38

A. Durbin never particularly stated damages 43

B. The trial court erred in allowing both the fraud in the inducement and the contract counts to go to the jury 45

III. The Trial Court Erred in Not Requiring Durbin to Plead Fraud with Specificity 46

IV. The Trial Court Erred in Allowing Durbin to Present Expert Testimony 49

V. The Trial Court Erred in Denying Equitable the Right to Qualify its Corporate Representative When She Testified 51

CONCLUSION 52

CERTIFICATE OF SERVICE 53

APPENDIX OF STATUTES 54

STATEMENT OF THE ISSUES

I. Whether the plaintiff can recover for fraud without sufficient evidence of a misrepresentation, when the plaintiff did not act to its detriment, when there is no evidence of intent to misrepresent, and when the plaintiff would have been in the same position if the alleged misrepresentation had not been made.

(a) Whether the plaintiff presented clear and convincing evidence of fraud.

(b) Whether the plaintiff must show that the misrepresentations alleged caused the plaintiff to act to its detriment.

(c) Whether the plaintiff should have reasonably relied on two year old statements in cancelling group insurance policies.

(d) Whether the plaintiff presented sufficient evidence for punitive damages.

II. Whether a mutual insurer breached a contract of insurance by not paying a dividend when its legally adopted dividend formula did not allocate a dividend.

(a) Whether it is error for a trial court to charge a jury with a specific figure of damages for breach of contract when that specific figure is not in evidence.

(b) Whether it is error for a trial court to submit counts of both breach of contract and fraud in the inducement of that contract to the jury.

III. Whether a trial court is in error if it fails to require a plaintiff to plead fraud with the specificity required by Fed. R. Civ. P. 9(b).

IV. Whether a trial court is in error in allowing expert testimony of insurance industry standards and practice to support allegations of fraud and breach of contract when the plaintiff presents no evidence that it knew of insurance industry standards and practice.

V. Whether a trial court is in error in prohibiting the defendant's employee who made calculations showing that the plaintiff was not damaged from stating her professional background and qualifications.

SUMMARY OF ARGUMENT

Equitable did not breach its group policies of insurance with Durbin or commit fraud. Durbin made these claims because Equitable did not pay it a dividend in 1982. According to New York and Alabama law, Equitable, a mutual insurance company organized under New York law, can pay a dividend only if it has unimpaired surplus and then only pursuant to a dividend formula adopted by Equitable's Board of Directors. Under the 1982 dividend formula, Durbin was not due a dividend regardless of the inclusion or exclusion of acquisition or investment selection expenses.

Durbin said 1982 dividend formula applied to it included two expenses in retention which prevented it from receiving a dividend. Equitable applied the same dividend formula nationwide; Equitable could not and did not single out Durbin to include two expenses against Durbin only. Equitable proved, and Durbin did not dispute, that Durbin would not have received a dividend in 1982 even if the two expenses were deleted. Equitable did not breach the contract.

Equitable committed no fraud. Equitable never promised Durbin a dividend. Durbin never proved how it acted to its detriment, either in renewing or cancelling the policies. Durbin alleged that misrepresentations were made in 1976 and 1979 or 1980. Yet Durbin did not decide to terminate until 1982. Durbin admitted at trial that, at the time of that decision, no one knew if Durbin would receive a dividend. Equitable had not paid Durbin a dividend for the previous two years. Durbin, therefore, could not have reasonably relied on the expectation of a dividend in reaching its decision to terminate the policies. Durbin never proved it was damaged, except to say that it did not receive a dividend that Durbin never proved was due.

Durbin alleged three misrepresentations, two written and one oral. The alleged misrepresentations, which do not meet the legal requirements for fraud because they were not material and were not made with intent to deceive, turned out to be true. Whatever it alleged, Durbin did not prove that the dividend formula actually did or should have provided Durbin a dividend. As a policyholder of a mutual insurance

company, Durbin is conclusively presumed under Alabama law to know that Equitable's charter prevents Equitable from paying dividends unless the dividend formula permits it.

The trial court erred in its jury instructions. Despite the lack of any testimony on an exact amount of alleged damage, the trial court's jury instructions included an exact figure of $46,060.00 in compensatory damages. The trial court also allowed the jury to consider two conflicting legal theories and return a verdict on both: breach of contract and fraud in the inducement of that contract. Alabama law prohibits this.

Additionally, the trial court abused its discretion by allowing expert testimony on health insurance industry practice. Durbin never proved that it relied on any insurance industry practices. Fraud, by definition, must be between the parties. What others do is irrelevant unless one party knows what others do and relies on the opposite party to follow others. Breach of a written contract is governed by the four corners of the document. Durbin's expert did not testify that Equitable breached the contract. Durbin's expert testimony was neither probative nor relevant, yet was highly prejudicial.

The trial court abused its discretion in denying Equitable the right to qualify its corporate representative when she testified. By not allowing Equitable to show the qualifications of is corporate representative, the jury was without a basis for considering her testimony that Durbin would not have been entitled to a dividend even if the two expenses had been eliminated.

Durbin never pleaded its allegations of fraud with particularity. Equitable did not learn what it would be called to defend itself against until trial. Federal Rule of Civil Procedure 9(b) prevents trial by ambush on fraud issues. The trial court erred in not requiring Durbin to plead its Complaint with specificity.

Equitable respectfully requests that this Court reverse the judgment of the trial court and render a verdict in favor of Equitable. Alternatively, Equitable respectfully requests that this Court reverse the judgment of the District Court and remand this matter for a new trial after Durbin has pleaded its fraud with specificity. The new trial should exclude expert testimony and allow Equitable to present to the jury the

educational and professional background of all of its witnesses. Alternatively, Equitable requests this Honorable Court reverse the trial court and declare that the evidence presented does not warrant a finding of punitive damages.

xxxxxxx

(F) DURBIN'S EVIDENCE IS INSUFFICIENT TO SUPPORT A CLAIM FOR PUNITIVE DAMAGES.

The trial court erred in instructing the jury that it could consider punitive damages. To support a claim for punitive damages, Durbin must show that the alleged misrepresentation was committed with intent to deceive and was gross, malicious and oppressive. *Williams v. United Insurance Co.*, 634 F.2d 813 (5th Cir. 1981). Equitable's repreated revelations to Durbin show that Equitable had no intent to defraud Durbin because Equitable did not hide the acquisition or investment selection expenses in the retention for the final three months of the policies. Both Durbin's and Durbin's trial expert had no trouble reading the documents Equitable sent to Durbin. *See* Plaintiff's Exhibits 34, 35 and 36 (correspondence and dividend reports). Equitable's alleged failure to inform sales representatives is not gross, malicious or oppressive. *See Williams*, 634 F.2d at 816 (United Insurance's alleged practice of issuing policies without alcohol exclusions while refusing to pay claims involving alcohol, but not telling its policyholders, was not gross, malicious or oppressive even when United represented to plaintiff that it would pay in the event of accidental death.).

A mistake will not support fraud or punitive damages. *Ralston Purina Co. v. Hobson*, 554 F.2d 725, 727 (5th Cir. 1977). The Alabama Supreme Court has held that a misassessment of a customer's needs does not support punitive damages. *Burroughs Corp. v. Hall Affiliates, Inc.*, 423 So. 2d 1348, 1354 (Ala. 1982). If John Pegram misunderstood Durbin's questions or if Durbin misunderstood Pegram's answers, then this misunderstanding does not allow punitive damages.

Durbin presented no testimony of active concealment. Failure to communicate what one party may deem impor-

tant, but what another party does not deem important or may, by error, have failed to learn, does not support a claim for punitive damages. *Hopkins v. Lawyers' Title Insurance Corp.*, 20 Ala. Bar Rep. 2250, 2258-59 (Ala. Supreme Ct., May 30, 1986).

Dissatisfaction by one party to a contract is not grounds for punitive damages either. Equitable tried to answer Durbin's questions and certainly provided vast amounts of documentation. *See Ford Motor Co. v. Burkett*, 494 So. 2d 416 (Ala. 1986) (wherefore Ford repeatedly tried to satisfy the customer, but she sued for fraud anyway. The Alabama Supreme Court found no grounds for punitive damages because Ford voluntarily and repeatedly attempted to satisfy its customer).

Alternatively, and for the same rationale as above, if punitive damages are warranted, the jury verdict was excessive and the trial court committed error in denying Equitable's Motion for Judgment Notwithstanding the Verdict, or, Alternatively, for a New Trial and/or not remitting the verdict [R1-81], especially in light of allegations of small actual damages and New York and Alabama law on dividend allocation.

APPENDIX C

EXCERPTS FROM REPLY BRIEF OF APPELLANT THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

IN THE UNITED STATES
COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT COURT

MARSHALL DURBIN FOOD CORPORATION	*	
Plaintiff-Appellee	*	
v.	*	Case No.: CV 86-7307
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,	*	
Defendant-Appellant.	*	

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
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REPLY BRIEF OF APPELLANT
THE EQUITABLE LIFE ASSURANCE
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TABLE OF CONTENTS

PAGE

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

ARGUMENT 2

1. EQUITABLE DID NOT BREACH THE CONTRACT OF INSURANCE 2

A. *The dividend formula did not provide for a dividend for the final three months* 2

1. Even if acquisition expense and investment selection charges were deleted, Durbin would have received no dividends 3

2. Durbin used the wrong figures in its chart and in computing dividends 4

3. The retrospective premium adjustment riders do not provide for return of any money to Durbin 4

4. Retention was not limited by the objective loss ratio 5

5. Durbin's purported calculations for the payment of dividends is erroneous 6

B. *Dividends are not calculated based on "actual losses [being] more favorable than the projected losses."* 8

C. *The trial court erred in allowing both the fraud in the inception and contract counts to go to the jury* 8

TABLE OF CONTENTS — (Continued)

PAGE

II. THE TRIAL COURT ERRED IN SUBMITTING FRAUD TO THE JURY 9

A. *Durbin did not expect a dividend when it terminated its policies* 9

B. *Equitable made no false representations* 10

1. Clyde Jennings made no misrepresentations 11

2. John Pegram made no misrepresentations 12

3. Durbin does not dispute the acquisition expense for the Tupelo plant, but only questions when the expense was assessed 14

4. Durbin concedes that the investment selection charge assessed on termination was proper 15

5. Equitable committed no fraud by deferring acquisition expense 15

C. *Equitable had no intent to misrepresent* 16

D. *Durbin never proved it bought, renewed, or terminated its Group policies with Equitable as a result of a misrepresentation* 18

E. *The alleged misrepresentation caused no damage* 19

F. *The trial court erred in instructing the jury that it could consider punitive damages* 19

TABLE OF CONTENTS — (Continued)

PAGE

III. DURBIN'S ACTION WAS DUE TO BE DISMISSED FOR FAILURE TO COMPLY WITH RULE 9(b) 22

IV. THE COURT ERRED IN ALLOWING DURBIN TO PRESENT EXPERT TESTIMONY 23

V. THE TRIAL COURT ERRED IN DENYING EQUITABLE THE RIGHT TO QUALIFY ITS CORPORATE REPRESENTATIVE WHEN SHE TESTIFIED 24

CONCLUSION 24

CERTIFICATE OF SERVICE 25

APPENDIX OF STATUTES 26

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F. *The trial court erred in instructing the jury that it could consider punitive damages.*

The trial court had no grounds for submitting to the jury the issue of punitive damages. In Durbin's dividend calculation, Equitable followed its nationwide dividend formula; Equitable did not single out Durbin with any particular expenses. In fact, Durbin learned of these expenses in retention only because Equitable provided documents declaring these expenses. Plaintiff's Exhibits 34, 35, and 36.

Equitable did not act intentionally, grossly, maliciously or oppressively. The law of punitive damages is not clear in Alabama; the Chief Justice of the Alabama Supreme Court wrote in *American Honda Motor Company v. Boyd,* 475 So. 2d 835 (Ala. 1985):

> The law as to punitive damages for deceit and fraud is far from being well settled in this state; as my dissent in *Ex parte Lewis* outlined, this Court has set forth several standards for the awarding of punitive damages and continues to mystify the bench and bar by failing to adopt one clear standard that properly takes into account the purpose and gravity of punitive damage awards. The standard "that if the evidence establishes an intent to deceive or defraud, then punitive damages are recoverable" defeats the purpose of punitive damages, which are intended to punish and deter gross, malicious, or oppressive conduct that is coupled with an intent to deceive or defraud. Simply proving an intent to deceive or defraud is not enough to warrant the extraordinary award of punitive damages. This Court has long followed "the gross, malicious or oppressive conduct with an intent to deceive or defraud" test. *Id.,* at 840 (Torbert, C. J., dissenting.)

Every case cited by Durbin to support its claim for punitive damages involved an unsophisticated individual consumer who was defrauded by a large corporation. Durbin's cases do not involve parties in equal bargaining position as here. For example, in *American Honda,* the manufacturer knew that the "new" car had been damaged before it was sold; the issue was whether the damage was "major" or "minor." In *Mobile Dodge v. Alford,* 487 So. 2d 866 (Ala. 1986) (*Shepard's* says a U.S. appeal is pending), the issue was whether the 1978 Corvette

had ever been wrecked. The salesman told the consumer that it had not; in fact the car was a combination of two wrecked vehicles. In *Washington National Insurance Co. v. Strickland,* 491 So. 2d 872 (Ala. 1985), the issue was not what the insurance agent said, but whether that agent had authority to make any representations.

Unless there is an initial finding of the knowledge of the falsity of the material representation, there can be no punitive damages. *American Honda Motor Company v. Boyd,* 475 So. 2d 835, 838 (Ala. 1985). Circumstantial evidence is not sufficient; the evidence must be clear and convincing. *See Nobility Homes, Inc. v. Ballentine,* 386 So. 2d 727, 730 (Ala. 1980). Where the defendant acted as it was entitled under its contract with plaintiff, there can be no fraud. *McIntyre Electric Services, Inc. v. SouthTrust Bank,* 495 So. 2d 1043 (Ala. 1986).

Durbin suggest circumstantial evidence is enough to prove intent to deceive and award punitive damages, citing *Neff v. Kehoe,* 708 F.2d 639 (11th Cir. 1983). No punitive damages were awarded in *Neff* where the representation was made recklessly or mistakenly, not with intent to deceive. *Id.* at 643. No punitive damages were awarded in the other case cited by Durbin in its conclusion either, *First Virginia Bankshares v. Benson.*

Durbin refers to its "repeated legitimate inquiries about retention" on page 43 of its brief, but never outlines these or provides a citation to the record. These inquiries occurred only prior to 1978 and once 18 months after the termination (Plaintiff's Exhibit 35). Durbin also alleges an affirmative corporate policy to conceal. Not only is no policy shown, but there was no affirmative action by any employee of Equitable to conceal any issues. Durbin did not plead concealment.

Alternatively, and for the same rationale as above, if punitive damages are warranted, the jury verdict was excessive. The cases cited in Equitable's initial brief support this. Durbin's brief claims on page 41 that Equitable did not provide case law and thus waived this argument. Using Durbin's rationale, Durbin has waived any argument on the issue of whether it was damaged because Durbin failed to demonstrate that it would have received a dividend, even if Equitable excluded expenses from its 1982 dividend formula.

APPENDIX D

EQUITABLE LETTER TO U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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August 25, 1987

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Mr. Miguel J. Cortez
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for the Eleventh Circuit
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RE: Marshall Durbin Food Corp. v. Equitable Life Assurance Society of the United States, Appellant
Circuit Court Case No. 86-7307

Dear Mr. Cortez:

Under Rule 28, Fed. R. App. P. 28(j) and the corresponding 11th Circuit Internal Operating Procedures, the appellant, The Equitable Life Assurance Society of the United States, directs to the Court the recently decided United States

Mr. Miguel J. Cortez
August 25, 1987
Page Two

Supreme Court case of *Pilot Life Insurance Company v. Dedeaux* 481, U.S. ___, 109 S. Ct. ___, 95 L. Ed 2d 39 (1987) in support of Equitable with regard to punitive damages found, in particular, in Equitable's brief beginning on page 36. the Supreme Court determined in *Pilot Life* that state law torts with their accompanying claims for punitive damages are pre-empted by Section 514 of ERISA, 29 USC Sec. 1144(a).

In keeping with the court's rule for succinct comment, Equitable states simply that both *Pilot Life* and the principal case arise from employer-funded employee benefit plans governed by ERISA. Durbin served as employer, plan sponsor, and had discretionary control, making Durbin a fiduciary.

In *Dedeaux*, plaintiff alleged tortious breach of contract just as Durbin alleged in Count I. In *Dedeaux*, plaintiff alleged fraud in the inducement, just as in Durbin's Count II. Durbin's remaining counts allege fraud under the *Alabama Code*.

Sincerely,

/s/ Jack B. Porterfield, Jr.

Jack B. Porterfield, Jr.

/s/ Mark S. Boardman

Mark S. Boardman

MSB:jlp
cc: Mr. Frank M. Young, III
Mr. Johathan H. Waller
Mr. Thomas Samford, IV

Supreme Court, U.S.
FILED
JUN 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1798

IN THE

Supreme Court Of The United States

October Term, 1987

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
Petitioner,

v.

MARSHALL DURBIN FOOD CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

Page

ARGUMENT 1

I. The Constitutional Issue is Substantial 1

II. There is strong division among the circuits as to the enforcement of Federal Rule of Civil Procedure 9(b) 3

CONCLUSION 4

TABLE OF AUTHORITIES

Statutes and Rules: *Page*

ERISA, 29 U.S.C. § 1001 et seq. 4

Federal Rule of Civil Procedure 9(b) 3, 4

Cases:

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) 1, 3

Bankers Life & Casualty Co. v. Crenshaw, 56 U.S.L.W. 4418 (1988) 2, 3

Giaccio v. Pennsylvania, 382 U.S. 399 (1966) 3

Jordan v. De George, 341 U.S. 223 (1951) 3

Other Authorities:

J. GHIRADI & J. KIRCHER, 1 PUNITIVE DAMAGES LAW & PRACTICE § 3.06 (Cum. Supp. 1987) 3

The Birmingham News, December 17, 1987 2

No. 87-1798

IN THE

Supreme Court Of The United States

October Term, 1987

THE EQUITABLE LIFE ASSURANCE SOCIETY
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v.

MARSHALL DURBIN FOOD CORPORATION,
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TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER, THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

ARGUMENT

I. The Constitutional Issue is Substantial.

This Court noted *Aetna Life Insurance Co. v. Lavoie,* 475 U.S. 813, 828-29 (1986) that the issue of the constitutionality of punitive damages must be resolved "in an appropriate setting." Respondent Durbin says this is not an appropriate setting, but offers little reasoning except to allege that the argument was not raised below. Respondent is incorrect. The issue of punitive damages, the excessiveness thereof, and the impro-

priety thereof, was raised in the trial and appellate court. The argument was refined in the application for rehearing to the Court of Appeals and further refined in Equitable's petition for certiorari. As Justice O'Connor noted in her concurring opinion in *Banker's Life & Casualty Co. v. Crenshaw,* 56 U.S. L.W. 4418, 4422 (1988), petitioner is not required to repeat the same arguments which advanced in the lower courts. Respondent claims that petitioner Equitable can only repeat or rehash earlier arguments. Respondent is incorrect. The entire appellate and certiorari process allows and encourages an appellant or petitioner to refine arguments, which is exactly what Equitable has done here.

This case is the "appropriate setting" for a determination of the constitutionality of punitive damages. The punitive damages levied here are five hundred times greater than the maximum fine provided by the Alabama Criminal Code for the same conduct alleged in the complaint. The action is between two large business entities, each with sufficient staffs and resources to monitor its business dealings. Respondent Durbin is the nation's twelfth largest chicken producer, processing 1.8 million chickens a week. The Birmingham News, December 17, 1987, at page 7B. This is not the case of an insurance company mishandling a claim where an individual had his leg amputated below the knee. *See Bankers Life & Casualty Co. v. Crenshaw,* 56 U.S.L.W. 4418 (1988). The punitive damage award in this case, according to the trial court, was largely influenced by an unfortunate inflammatory comment made by a witness for Equitable who was not involved in the transaction made the basis of the suit. Transcript at 394-95. Equitable's witness Jean Rassell commented that she became involved after litigation began when she decided to see for herself if one of the letters made the basis of the lawsuit could be understood by "chicken farmers in Alabama . . . with only fifth grade educations." Transcript at 294. The jury had no standard by which to govern itself in the award of punitive damages. That lack of a standard has not been changed by the Alabama Tort Reform Act, contrary to respondent's argument

on page 8 of its brief. Respondent Durbin says that this Court should defer to the legislature, but legislative band-aids are insufficient here. The Alabama legislature's 1987 tort reform legislation does not eliminate punitive damages. Thus, although this Court has waited for legislative remedies, since the Alabama legislature's remedy is constitutionally insufficient, the Court should act here to eliminate punitive damages.

Respondent ignores that this case is an appropriate setting for the examination of the constitutionality of punitive damages by arguing the issue was not raised sufficiently below. Although this is incorrect (*see supra*), failure to raise an issue below is not fatal to a petition for certiorari. *Bankers Life & Casualty Co. v. Crenshaw,* 56 U.S.L.W. 4418, 4420 (1988). For example, in *Aetna Life Insurance Co. v. Lavoie,* 475 U.S. 813 (1986), this Court addressed the constitutional argument not previously raised in the lower courts. See J. Ghiradi and J. Kircher, 1 Punitive Damages: Law and Practice, § 3.06, at 15 (Cum. Supp. 1987). While it may not have been prudent for this Court to review the constitutionality of punitive damages in the *Crenshaw* appeal where the issue was not specifically raised and no reference was made to the Constitution or Eighth Amendment in the petition for rehearing to the Mississippi Supreme Court, this case, which comes to the Court through certiorari, has specific constitutional challenges refined and raised to the 11th Circuit on rehearing.

II. There is strong division among the circuits as to the enforcement of Federal Rule of Civil Procedure 9(b).

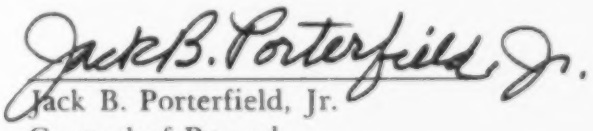
Respondent Durbin's brief discussion of Rule 9(b) ignores the differences existing between the circuits in the enforcement of Rule 9(b). Durbin ignores the constitutional standard of specificity recognized by this Court not only in the enforcement of criminal statutes, but the enforcement of civil ones as well: *Giaccio v. Pennsylvania,* 382 U.S. 399 (1966), and *Jordan v. De George,* 341 U.S. 223 (1951). The equal protection clause of the Fourteenth Amendment requires equality in the law,

particularly when the object of the law, whether criminal or civil, is punishment.

CONCLUSION

For the reasons specified, this petition for certiorari is the appropriate setting for a determination of the constitutionality of punitive damages and for a declaration to the federal courts for uniform enforcement of Federal Rule of Civil Procedure 9(b). The prohibition of the assessment of punitive damages by ERISA, 29 U.S.C. § 1001 et seq., was sufficiently addressed in the original petition; respondent fails to identify why the broadest interpretation does not apply since Congress obviously intended to provide protection for pension and employee benefit plans and to encourage their creation. Petitioner, The Equitable Life Assurance Society of the United States requests the Court grant its Petition.

Respectfully submitted,



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